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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1986

BEGINNING OF TERM

OCTOBER 6, 1986, THROUGH FEBRUARY 23, 1987

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND
FRANK D. WAGNER
REPORTERS OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1989

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.

RETIRED

WARREN E. BURGER, CHIEF JUSTICE.

OFFICERS OF THE COURT

EDWIN MEESE III, ATTORNEY GENERAL.
CHARLES FRIED, SOLICITOR GENERAL.
JOSEPH F. SPANIOL, JR., CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.[1]
FRANK D. WAGNER, REPORTER OF DECISIONS.[2]
ALFRED WONG, MARSHAL.
STEPHEN G. MARGETON, LIBRARIAN.

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[1] Mr. Lind retired as Reporter of Decisions on Januray 31, 1987. See *post*, p. XXI.

[2] Mr. Wagner was appointed Reporter of Decisions effective February 1, 1987. See *post*, p. 1023.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.*

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

October 6, 1986.

(For next previous allotment, and modifications, see 453 U. S., p. VI, 459 U. S., p. IV, and 478 U. S., p. V.)

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*For order of December 4, 1986, temporarily assigning JUSTICE SCALIA to the District of Columbia Circuit, see *post*, p. 1002.

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF JUSTICE STEWART*

MONDAY, OCTOBER 20, 1986

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE POWELL, JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SCALIA.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the resolutions of the Bar of the Supreme Court in tribute to our former colleague and friend, the late Justice Stewart.

The Solicitor General is recognized at this time for the purpose of presenting those resolutions which were adopted by the Bar. Mr. Solicitor General.

Mr. Solicitor General Fried addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The members of the Bar of the Court met this day and have adopted resolutions in honor of Justice Stewart. And I would ask leave of the Court to present those resolutions at this time.

We have convened today in this Temple of Justice where the late Associate Justice Potter Stewart served with the highest distinction to give formal expression to the esteem

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*Justice Stewart, who retired from active service on the Court effective July 3, 1981 (453 U. S. III, IV), died in Hanover, N. H., on December 7, 1985 (474 U. S. III, VII). Services were held at the Washington Cathedral, Washington, D. C., prior to his interment in Arlington National Cemetery on December 11, 1985.

and affection in which we held this able and devoted lawyer and jurist.

He was born January 23, 1915 in Jackson, Michigan, the birthplace, also, of the political party with which he was affiliated before he began his judicial career; but he grew up in Ohio, the family home, where the Stewarts had for many years contributed signally to the development and governance of the Buckeye State. He was the son of Harriet Potter Stewart and James Garfield Stewart, a fabled orator who included among his achievements service for several terms as mayor of Cincinnati and later as Justice of the Supreme Court of Ohio. Potter Stewart attended Cincinnati's University School, Hotchkiss School, and Yale College, where he graduated *cum laude*, was elected to Phi Beta Kappa, and served as Chairman of the *Yale Daily News*. After a year at Cambridge on a Henry fellowship, he entered the Yale Law School. He received his J.D. degree from Yale in 1941 after a brilliant academic career that included an editorship of the *Yale Law Journal*. These were the days when the validity of much of the New Deal Legislation was challenged in the Court and Yale Law School was in the van of the legal realism movement. Professor Jerold Israel, who served as one of his law clerks, has speculated that these debates may have had a significant impact upon the development of Justice Stewart's legal philosophy.[1]

His initial employment with a Wall Street law firm was interrupted in its first year when our Nation entered World War II. He served more than three years on active duty in the United States Naval Reserves as a deck officer on oil tankers in what he called the "dungaree navy." He concluded his naval service with three battle stars, and after a brief period with the Wall Street firm, returned to Cincinnati to join a leading firm in the general practice of law.

He and Mary Ann Bertles had married on April 24, 1943, and they both settled down to the challenging and rewarding

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[1] Israel, *Justice Potter Stewart*, in IV The Justices of the Supreme Court (L. Friedman and F. Israel, eds., 1969).

life of a promising young lawyer in the Queen City. His ability was recognized in his service in many charitable and civic community organizations, and he was elected in 1950 to the Cincinnati City Council. He was reelected in 1952, and was serving as vice-mayor when President Dwight D. Eisenhower appointed him, although only thirty-nine years of age, to the United States Court of Appeals for the Sixth Circuit on June 1, 1954. This appointment afforded the young judge an excellent opportunity to acquire a wide range of judicial experience.

As Justice Stewart was to observe later, "The Sixth Federal Judicial Circuit is a cross section of the nation. Extending from the tip of Michigan's upper peninsula to the Mississippi border, it spans the heartland of our country. So it is that the United States Court of Appeals for the Sixth Circuit is not a regional court but in every sense a national one. Its workload reflects the pluralism and diversity of our national life. To it for decision came admiralty cases from the Great Lakes, moonshine cases from Appalachia, labor cases from Cleveland, patent cases from Detroit, tax cases from Memphis—criminal cases and civil cases of every conceivable kind from almost everywhere within the Circuit's broad borders."[2]

In his four years as the junior judge of the Sixth Circuit Court of Appeals, Justice Stewart quickly earned the reputation of a careful, learned, and industrious judge. When Justice Harold Burton, a fellow Ohioan announced his retirement in the fall of 1958, it surprised no one that President Eisenhower turned to the talented and energetic young Cincinnati judge from the Sixth Circuit.

Professor Israel has written, ". . . on October 7, 1958, [when] President Eisenhower formally announced the appointment, [t]he selection of Stewart was highly praised by the bar, although there was some southern opposition to the appointment of a 'northern integrationist.' (One of Stew-

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[2] Stewart, J., Preface, *The Sixth Circuit Review* 1968–69, 1970 U. Tol. L. Rev. 49.

art's few major constitutional decisions on the Court of Appeals had been a school segregation case in which the court ordered almost immediate integration, *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2d 853 [6th Cir. 1956].) Only forty-three at the time of his appointment, Stewart became the second youngest Supreme Court Justice since the pre-Civil War period."[3]

Many observers of and commentators on the business of the Court frequently try to identify an ideological division between the justices and attempt to explain the decisions of the Court as reflecting the philosophical predispositions of their authors. When Stewart took his seat, the Court was popularly viewed as evenly divided between an activist or liberal group of four Justices and a passivist or conservative group of an equal number. Stewart was asked by a journalist how he classified himself. His response came as no surprise to those who knew him, "I like to be thought of as a lawyer."

Dean Terrance Sandalow, Justice Stewart's first law clerk on the Court, has written, "Justice Stewart never confused cases with causes or ideology. The responsibility of the judge, in his view, is to decide the former, not to promote the latter."[4]

Professor Laurence H. Tribe, another Stewart law clerk, also recognized this approach of the Justice to the decisional process, "He was less interested in pursuing a unified philosophical vision than in determining what the law, as he understood it, required in the case at hand. And his most consistent philosophy was his skepticism about the virtues of apparently consistent philosophies. Never an ideologue, Justice Stewart found himself at the Court's 'center' not out of political predilection, but because his habit of mind was to start from a position of equipoise, and from there to assess the competing arguments of the parties before him. What the particular parties in a case had to say mattered greatly to this Justice; he saw the Court's business as that of deciding

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[3] Israel, *supra*, note 1.

[4] Sandalow, *Potter Stewart*, 95 Harv. L. Rev. 6 (1980).

cases, not of arbitrating causes. Thus he was ever the careful student of the briefs and, during oral argument, one of the most active Justices—which is to say, from the perspective of one who has argued before him, one of the most relentless and demanding."[5]

His personal relationships with his judicial brethren and with the lawyers who came before the Court was one of unfailing courtesy and consideration, and he always manifested the greatest respect for the traditions of the legal profession and the Court. Once, an overzealous lawyer during a question period at a Sixth Circuit Conference asked Justice Stewart about an opinion of "Wiley Rutledge." Justice Stewart looked at the lawyer quizzically and inquired, "Were you personally acquainted with Mr. Justice Rutledge?"

But Justice Stewart was not without passion. Manifest injustices could evoke from him the scathing denunciation of an Old Testament prophet. Shortly before he retired, with hands almost trembling as he suppressed his outrage, he read from the bench a dissenting opinion in which he refused to accord absolute judicial immunity to a state judge who had, *ex parte*, at the request of the parents of a fifteen year old girl, authorized her sterilization without her knowledge. "A Judge is not free like a loose cannon," he said, "to inflict damage whenever he announces that he is acting in his judicial capacity."[6]

Although the Court was its professional centerpiece, it was not all of Justice Stewart's life, and at the end of the Term in 1981 he decided to retire at age 66 to permit him to spend more time with his beloved Andy, their children and grandchildren.

His retirement plans included making recordings for talking books for the blind and serving on public and private boards and commissions where he might share some of the rich experiences and wisdom that he had acquired in his eventful life. He achieved many of these goals when, in the fullness of his involvement with life, he left it on December 7, 1985.

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[5] Tribe, *Tribute to Potter Stewart*, 95 Yale L. J. 1328 (1986).

[6] *Stump* v. *Sparkman*, 435 U. S. 349, 364 (1978).

He wrote a short concurring opinion in *Jacobellis* v. *Ohio*[7] that was reconstructed by the press into an epigram that received such currency that he feared that it might become his epitaph. A rephrasing of that apothegm would make it read more appropriately, "He may not have been able to define justice, but he knew it when he dispensed it."

Wherefore, it is accordingly

RESOLVED, that we, the Bar of the Supreme Court of the United States, express our lasting and great appreciation for the exemplary service rendered by Potter Stewart during his long public career, as Cincinnati councilman, as Judge of the Court of Appeals, and then as a distinguished Associate Justice of this Court, and later as a retired Associate Justice; that we record with great affection and esteem for him, and our admiration for the qualities of wise judgment, of diligent and perceptive craftsmanship, and of personal generosity and gentlemanliness which enabled him to be so effective in contributing to the progress of the law and to the betterment of our Nation; and it is further

RESOLVED, that the Solicitor General be asked to present these Resolutions to the Court and that the Attorney General be asked to move that they be inscribed upon the Court's permanent record.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. The Court now recognizes the Attorney General of the United States.

Mr. Attorney General Meese addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

As you have heard from the Solicitor General, the Bar of this Court met today to honor the memory of Potter Stewart, Associate Justice of the Supreme Court from 1958 to

[7] 378 U. S. 184, 197 (1964).

1981. It is my privilege on behalf of the Supreme Court Bar to present a few remarks about this distinguished jurist and to offer a motion before the Court.

Justice Stewart was only 43 years old when President Eisenhower appointed him to this Court. But while he came to the Court relatively young in age, Potter Stewart brought with him a highly developed sense of our system of governance and a finely tuned appreciation for the purposes and vision of the written Constitution that structures that system. As part of that appreciation, he had a particularly keen understanding of the role of a judge in our constitutional republic.

Justice Stewart began learning about our constitutional system of governance at an early age. His father was a mayor and, later, a judge on the Ohio Supreme Court. Justice Stewart learned about the legal system from his father and then followed his father's path in law, government, and the judiciary. He studied jurisprudence at Cambridge and Yale Universities, practiced law in New York and Cincinnati, served as a member of the city council and as a vice-mayor of Cincinnati, and sat as a federal judge on the Sixth Circuit Court of Appeals. Thus, by the time he came to this Court, Potter Stewart had the seasoning of firsthand experience with almost every aspect of the legal system and the institutions that function within it.

These experiences profoundly shaped Justice Stewart's view of the function of this Court in interpreting the Constitution and laws of our country. Having served in a war, in local elective office, and on the federal appellate bench, Justice Stewart had a particularly keen understanding of the role played by each of the different branches of government in our constitutional system. He appreciated, as did the Founding Fathers, the importance of a separation of powers, of federalism, and of an independent judiciary to the preservation of liberty. Justice Stewart realized that reposing unchecked authority in *any* branch of government is the antithesis of what our constitutional system is about.

It has been often noted that Justice Stewart avoided unnecessarily far-reaching pronouncements and paid unusually careful attention to the facts of the cases before him. At oral argument he always wanted advocates to be attentive to the facts that produced and shaped a particular dispute. He repeatedly stressed that the heart of a case could be found in its facts, and he was not satisfied to proceed on less than a full understanding of those facts. His opinions typically reflect the same focus: they carefully document the events that brought a particular controversy to the Court, examine the various arguments that the parties could make in advocating a particular result, and then, applying Occam's razor, answer the question presented—and no more. Justice Stewart's public performance thus exemplified his conviction that the Court is on the surest and most proper ground when it acts not as a philosophical or political body, but rather as a legal, institution.

Whether one agreed or disagreed with his opinions in particular cases, Justice Stewart's lawyerly approach, good judgment, and elegant prose always brought great credit to this Court. His jurisprudence shows a reverence for the basic tenets of our constitutional tradition—free speech, religious liberty, protection of civil rights, and reliance on the representative processes of government.

For example, in cases involving speech and religion, Justice Stewart urged the Court to champion "a society of free choice." [*Ginsberg* v. *New York*, 390 U. S. 629, 648 (1968) (Stewart, J., concurring).] He believed, as he said, that "those who wrote our First Amendment . . . put their faith, for better or worse, in the enlightened choice of the people, free from interference of a policeman's intrusive thumb or a judge's heavy hand." [*Ginzburg* v. *United States*, 383 U. S. 463, 498 (1966) (Stewart, J., dissenting).] Thus, he wrote for the Court in *Edwards* v. *South Carolina* that a State could not "make criminal the peaceful expression of unpopular views," [*Edwards* v. *South Carolina*, 372 U. S. 229, 237 (1963),] and he dissented when the Court allowed a State, in his view, to force an individual "to choose between his

religious faith and his economic survival." [*Braunfeld* v. *Brown*, 366 U. S. 599, 616 (1961) (Stewart, J., dissenting).] To Justice Stewart, the First Amendment was the "foundation" on which our constitutional system is built. [See *Bates* v. *Little Rock*, 361 U. S. 516, 522–523 (1960).]

Justice Stewart understood that our Constitution guarantees more than just orderly processes. He deeply believed, for example, that the Constitution—without exception—guarantees equal treatment for people of *all* races. He wrote that the Constitution does not allow "the criminality of an act [to] depend upon the race of the actor," [*McLaughlin* v. *Florida*, 379 U. S. 184, 198 (1964) (Stewart, J., concurring); see also *Loving* v. *Virginia*, 388 U. S. 1, 13 (1967),] and he dissented in a case involving a race-conscious program sponsored by the Federal Government, stating that the "equal protection standard of the Constitution had one clear and central meaning—it absolutely prohibits invidious discrimination by government." [See *Fullilove* v. *Klutznick*, 448 U. S. 448, 523 (1980).] Justice Stewart believed that our Constitution has promised equal opportunity to all, and all institutions of government are duty bound to enforce that promise.

Justice Stewart also believed that the Constitution preserved various powers for the states. For example, though he agreed that the Eighth Amendment's prohibition against capital punishment was substantial, he believed that the states were entitled to enact death penalty statutes with appropriate safeguards. [See *Gregg* v. *Georgia*, 428 U. S. 153 (1976).] Similarly, though he believed Congress had substantial power to regulate interstate commerce, he believed strongly that the regulation of "wholly local activities" was reserved to the states. [*Perez* v. *United States*, 402 U. S. 146, 157 (1971) (dissenting opinion).]

Justice Stewart viewed as a pervasive theme of our Constitution a deep faith that each individual in our society is capable of intelligent choice. This conviction in the ability of individuals rationally to choose underlay his pronouncement for the Court that the Sixth and Fourteenth Amendments give a criminal defendant the right "to proceed *without* coun-

sel when he voluntarily and intelligently elects to do so." [*Faretta* v. *California*, 422 U. S. 806, 807 (1975) (emphasis in original).] It similarly underlay his positions, albeit in dissent, that public school students should be allowed to engage in voluntary non-denominational prayer, [see *Engel* v. *Vitale*, 370 U. S. 421, 444–445 (1962) (Stewart, J., dissenting)]; and that criminal suspects should be allowed to respond to questions without first being warned of their privilege against self-incrimination and of the consequences of foregoing it, [see *Miranda* v. *Arizona*, 384 U. S. 436, 504–545 (1966) (dissenting opinion); see also *Orozco* v. *Texas*, 394 U. S. 324, 331 (1969) (Stewart, J., dissenting).]

Concomitantly, Justice Stewart appreciated that "the essence of judicial duty [required him] to subordinate [his] own personal views . . . ," [*Griswold* v. *Connecticut*, 381 U. S. 479, 530–531 (1965) (Stewart, J., dissenting),] and that the Court should not normally substitute its judgment for that of elected legislative bodies. Thus, in an equal protection opinion, he forcefully articulated for the Court the proposition that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court," [*Dandridge* v. *Williams*, 397 U. S. 471, 487 (1970),] and he found especially troubling cases which called upon the Court to address claims not expressly governed by the text or the history of the Constitution itself. [See *Griswold* v. *Connecticut*, 381 U. S. at 530–531.] However, in cases where the Constitutional text and history *is* clear, Justice Stewart was properly forceful and vigilant in safeguarding fundamental civil rights. [As evidenced by his opinion for the Court in *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234 (1978).]

In remembering Justice Stewart's work and career, we should also remember his unusual personal qualities of character, integrity, and intelligence. Justice Stewart had a quick wit that cut through cant or hypocrisy and he learned early on not to take himself too seriously. While a student at Hotchkiss he was elected class wit with 43 votes. The next

closest wit got only 4. I personally learned of Potter Stewart's sense of humor and good fellowship when the two of us joined William Buckley and Walter Cronkite in a humorous skit on the stage of the Bohemian Grove.

Those of us who had the privilege to know him will always remember Justice Stewart's love for politics, the Cincinnati Reds, and most of all his family. For Justice Stewart was a husband, father, and grandfather who savored his private life as much as his public service. Many public men and women often find it difficult in the midst of attention and honors to keep their eye on what T. S. Eliot called "the permanent things." Justice Stewart knew his priorities. He always put his family first.

MR. CHIEF JUSTICE, in the name of the lawyers of this Nation and, in particular, of the Bar of this Court, I respectfully request that the resolutions presented in honor and celebration of the memory of the late Justice Potter Stewart be accepted by you, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General and Mr. Solicitor General, the Court thanks you on behalf of the Bar for your presentations today in memory of our late colleague and friend, Justice Stewart.

We ask that you convey to Chairman McCree and the members of the Committee on Resolutions our profound appreciation for these very appropriate resolutions. Your motion that these resolutions be made a part of the permanent record of the Court is hereby granted.

Potter Stewart was many things besides a judge.

He was an avid fan of the Cincinnati Reds baseball team. Those of us who served with him at the time can still remember his intense interest in that great seven-game World Series of 1975 between the Cincinnati Reds and the Boston Red Sox, and his delight with the Reds' triumph in four games over the New York Yankees in the World Series of 1976.

He was a fisherman. In fact, he was one of the very few fishermen I have ever known who didn't like to get up early in the morning.

He was a patriot, not in the sense often attributed to Stephen Decatur—"my country, right or wrong,"—but in the sense that many of his contemporaries were, contemporaries who had served creditably and honorably in the Armed Forces in the Second World War and who still many years later got goose bumps when they saw the flag passing by on a ceremonial occasion.

He was also something of a mentor to me, although he may not have realized it. He was not the sort of a fellow to ostentatiously take a neophyte under his wing, and show him how the land lay. But a number of his very perceptive observations made to me—and doubtless made to others who had joined the Court after he had—gave me a feel for the way the institution worked.

I remember his telling me that he felt he would never know more about a case than when he left the bench after hearing the case orally argued. Over a period of time I tested out this bit of wisdom which he had imparted, and came to agree with him completely.

Justices of this Court rightly prize their complete independence, not only from authority in the other branches of government, but from their colleagues; no member of this Court is bound to surrender his opinion on a particular matter even though eight colleagues totally disagree with him. Potter Stewart cherished this independence in the same way that all of us do, but he was also constantly mindful that even on an Article III court such as ours, a judge is a member of an organization. The organization has no claim on the judgment of a Justice, but it does have a claim of a smaller order—that the judge manage his own work in such a way as to assist his eight colleagues in getting their work done. Potter Stewart managed as well as any colleague I have known to balance the demands of the collegiate institution against the need for full development and exposition of one's own opinions in cases before the Court.

He was a superb craftsman of the written opinion. His opinions were short, lucid, and to the point. His father, James Garfield Stewart, had been active in elective politics in the state of Ohio, and was in fact serving on the Supreme Court of Ohio when Potter Stewart was appointed to this Court. Potter retained a lively spectator's interest in electoral politics for all of his life, but like all good judges he refrained from mixing partisan politics with judging. When his opinions had finished dealing with the legal questions involved, they ended; he was content to be a judge, and did not aspire to be a robed statesman. His discussion of cases at the conferences of the Court followed the same model: lucid, analytical, and to the point.

During the time he served with Chief Justice Burger, Potter Stewart was on occasion referred to as one of the "swing" votes on the Court, which is an appellation apparently reserved for those who are somewhere in the middle of the ideological spectrum of the Court as constituted at a particular time. If this classification be thought to suggest that he had no established constitutional hierarchy of his own, it could not be more mistaken. During his period of service with Chief Justice Warren, he was often in dissent in some of the Warren Court's decisions about the constitutional rights of criminal defendants. During his service with Chief Justice Burger, he was more often with the majority in cases such as this. But it was not he who altered his views; it was the cases coming before the Court and the personae of the Court which had changed.

Many of the questions which perplexed the Court during the twenty-three years during which he served have not been finally resolved, nor will they be resolved in our time. They embody the issues on which judges of different philosophies can and do often disagree; the judicial quest is not to finally put at rest the claims of government against the claims of the individual, the need for order against the desire for liberty; that is too much to ask of any judges who are, after all, human. The quest is rather to draw the boundaries in each succeeding case, knowing that our efforts are apt to be as

transient as those of our predecessors, and very likely those of our successors.

But in this often baffling endeavor, those of us who knew Potter Stewart, and particularly those of us who served with him on this Court, know how fortunate it was that during these twenty-three years there sat upon this bench a judge of keen and penetrating intellect and unwavering devotion, not simply to the exposition of his own ideas, but to the work of the Court as a court. He devoted a large part of his life to that endeavor, and this Court, the Bar, and his country are the better for his efforts.

RETIREMENTS AND APPOINTMENTS

SUPREME COURT OF THE UNITED STATES

MONDAY, JANUARY 12, 1987

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SCALIA.

THE CHIEF JUSTICE said:

I am authorized to announce that Mr. Henry C. Lind, who has served as the official Reporter of Decisions of the Court since February, 1979, is retiring effective January 31, 1987.

The Reporter of Decisions is responsible for the publication in the official United States Reports of all of the Court's orders and opinions, as well as the separate opinions of the Justices. During his tenure, Mr. Lind has been instrumental in assisting in the changeover from the hot lead system of printing the Reports to our modern computer system. The Reporter's tasks also include the editing of opinions in the sense of attempting to establish consistency as to such matters as the forms of citations, preferred spelling of words, punctuation, and grammar—not an enviable task when dealing with nine separate chambers. Mr. Lind has performed his duties with great success—he has even been able to secure approval from the majority of the Court to spell the word "marijuana" with a "j" rather than an "h." The Court wishes to pay tribute to him and to wish him well for the years ahead.

Mr. Frank D. Wagner has been appointed by the Court to succeed Mr. Lind as the 15th Reporter of Decisions, pursuant to Title 28 of the United States Code, Section 673.

I am also authorized to announce the retirement of James S. Zagami, Captain of the Supreme Court Police Force, effective January 13, 1987. Captain Zagami has served with the Supreme Court Police Force for over thirty years and the Court wishes him much happiness in the years ahead.

I have appointed Mr. Noel J. Augustyn as my Administrative Assistant pursuant to Title 28 of the United States Code, Section 677, effective January 5, 1987.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1986

ROSE *v.* ARKANSAS STATE POLICE ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARKANSAS

No. 85–1388. Decided November 3, 1986

After an Arkansas State Trooper was killed in the line of duty, his widow (petitioner) received a $50,000 benefit from the Federal Government pursuant to the Public Safety Officers' Death Benefits Act. The Act provides that its benefits "shall be in addition to any other benefit that may be due from any other source," with certain exceptions not applicable here. Petitioner also applied for death benefits under the Arkansas Workers' Compensation Act, which contains a provision (enacted three years after the federal Benefits Act) stating that benefits under the State Act shall be reduced by the amount of any federal payment under "an Act of Congress providing benefits for public safety officers." State administrative proceedings instituted by petitioner ultimately resulted in the rejection of her claim that her state benefits should not be offset by the federal payment. It was held that there was no inconsistency between the state and federal laws, and thus that the state statute need not give way under the Supremacy Clause of the Federal Constitution. The Arkansas Court of Appeals affirmed.

Held: The Arkansas statute authorizes the precise conduct that Congress sought to prohibit and consequently is repugnant to the Supremacy Clause. The conflict between the Arkansas law and the federal Benefits Act is clear from the language of the statutes. The state court's reasoning that the federal law did not alter the States' traditional right to set the level of workers' compensation benefits misses the point. The Benefits Act does not require a State to set a particular benefit level for its

citizens; it simply prohibits a State from reducing the compensation it otherwise would provide to account for the federal payment. This reading of the Benefits Act is consistent with the legislative history, that shows that Congress was concerned about the inadequacy of death benefits paid to police officers by some States. *Richardson* v. *Belcher*, 404 U. S. 78, distinguished.

Certiorari granted; 16 Ark. App. 96, 697 S. W. 2d 927, reversed and remanded.

PER CURIAM.

In December 1982, Arkansas State Trooper William Rose was killed in the line of duty. His widow, petitioner in this action, received a $50,000 benefit from the Federal Government pursuant to the Public Safety Officers' Death Benefits Act, 93 Stat. 1219, 42 U. S. C. § 3796 *et seq.* The Benefits Act provides for a $50,000 payment to the survivors of a state law enforcement officer who dies as a result of job-related injuries. The federal statute also provides that "[t]he benefit payable under this subchapter shall be in addition to any other benefit that may be due from any other source," with two exceptions not relevant here. § 3796(e).

Petitioner also applied for death benefits under the Arkansas Workers' Compensation Act. See Ark. Stat. Ann. § 12–3601 *et seq.* (1979). Respondent Public Employee Claims Division of the Arkansas Insurance Department acknowledged that the claim was compensable, but insisted on reducing the amount owed to Rose by the amount she had received under the federal Benefits Act. In support of its position, respondent relied on a state statute that provides:

> "In the event that any public employee who is entitled to receive workers' compensation . . . as a result of injury, disability or death, and such injuries, disabilities, or death gives rise to an entitlement of benefits under . . . an Act of Congress providing benefits for public safety officers . . . the state workers' compensation fun[d] shall be entitled to a credit against its liability . . . to the extent of the [federal] benefits received . . . ." Ark. Stat. Ann. § 12–3605(G) (Supp. 1985).

1 Per Curiam

Rose filed a complaint with the Arkansas Workers' Compensation Commission, claiming that her state benefits should not be offset by the federal payment. An Administrative Law Judge ordered respondent to compensate petitioner in full, noting that the Benefits Act plainly states that the federal money is intended to supplement all other benefits. The ALJ ruled that the state statute was in direct conflict with the Benefits Act, and that under the Supremacy Clause of the United States Constitution,* the Arkansas provision must give way. The full Commission reversed the ALJ and allowed the offset, finding no inconsistency between the state and federal laws.

The Arkansas Court of Appeals affirmed the Commission's decision. 16 Ark. App. 96, 697 S. W. 2d 927 (1985). The court first cited *Richardson* v. *Belcher*, 404 U. S. 78 (1971), for the proposition that there is nothing inherently unconstitutional about offsetting state and federal benefits. The state court then concluded that the offset in this case was proper, because the Benefits Act does not show a congressional intent to intrude on the States' right to set workers' compensation benefits. Therefore, said the court, "[w]e fail to see a supremacy clause argument." 16 Ark. App., at 99, 697 S. W. 2d, at 928. The Arkansas Supreme Court denied petitioner's request for review.

There can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress. *Hayfield Northern R. Co.* v. *Chicago & North Western Transportation Co.*, 467 U. S. 622, 627, and n. 4 (1984) (citing *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824)). In this case, the conflict between the Arkansas law and the Benefits Act is clear from the language of the statutes. The

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* "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const., Art. VI, cl. 2.

Benefits Act unambiguously provides that the $50,000 payment "shall be *in addition* to any other benefit that may be due from *any* other source." 42 U. S. C. § 3796(e) (emphasis added). Congress plainly intended to give supplemental benefits to the survivors, not to assist the States by subsidizing their benefit programs. The Arkansas statute, however, passed three years after the Benefits Act was enacted, provides that the state award shall be reduced by the full amount of the federal payment. The state statute authorizes the precise conduct that Congress sought to prohibit and consequently is repugnant to the Supremacy Clause.

The state court nevertheless failed to perceive a tension between the two statutes, concluding that the federal law did not alter the States' traditional right to set the level of workers' compensation benefits. This reasoning misses the point. The Benefits Act does not require a State to set a particular benefit level for its citizens; it simply prohibits a State from reducing the compensation it otherwise would provide to account for the federal payment. This reading of the Benefits Act is consistent with the legislative history, that shows that Congress was concerned about the inadequacy of death benefits paid to police officers by some States. See H. R. Rep. No. 94–1032, p. 3 (1976); see also 122 Cong. Rec. 12005 (1976) (remarks of Rep. Biaggi). Congress intended that the $50,000 would be a "gratuity," and would provide payment "over and above all other benefits." See S. Rep. No. 96–142, p. 58 (1979) ("gratuity"); 122 Cong. Rec. 12002 (remarks of Rep. Eilberg).

The Arkansas court's reliance on *Richardson* v. *Belcher*, *supra*, is misplaced. In that case the Court upheld a law allowing the reduction of *federal* benefits to account for *state* awards of workers' compensation. See *id.*, at 78–79, and n. 1. *Belcher* did not present a Supremacy Clause issue.

Because the Benefits Act prohibits States from offsetting their death benefits against the federal payment, § 12–3605(G) of the Ark. Stat. Ann. (Supp. 1985) is invalid. We therefore

grant the petition for certiorari, reverse the decision of the Arkansas Court of Appeals, and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See, *e. g.*, *Acosta* v. *Louisiana Dept. of Health and Human Resources*, 478 U. S. 251 (1986) (MARSHALL, J., dissenting).

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION ET AL. *v.* CREST STREET COMMUNITY COUNCIL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-767. Argued October 7, 1986—Decided November 4, 1986

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, provides that "[i]n any action or proceeding to enforce" certain enumerated civil rights laws, including Title VI of the Civil Rights Act of 1964, the court may award attorney's fees to the prevailing party, other than the United States. Title VI prohibits "any program or activity receiving Federal financial assistance" from discriminating on the basis of race, color, or national origin. Respondents filed an administrative complaint with the United States Department of Transportation, challenging petitioner North Carolina Department of Transportation's proposed extension of a largely federally funded major expressway through an established, predominantly black neighborhood in the city of Durham as violative of Title VI. Subsequent negotiations resulted, after five years, in a Final Mitigation Plan executed by petitioners, respondents, and the city that resolved the controversy. In the meantime, construction of the highway extension had been enjoined by the Federal District Court in an unrelated action alleging violations of certain federal statutes that did not include any civil rights laws. Respondents in the instant case moved to intervene in that action and filed a proposed complaint asserting Title VI violations. The District Court subsequently entered a consent judgment dissolving the injunction and dismissing the action and also respondents' Title VI claims on the condition that petitioners implement the Final Mitigation Plan. The following day that Plan was executed. Respondents then filed an action in District Court for attorney's fees under § 1988 for services performed by their counsel in preparing the administrative complaint and in negotiating resolution of the dispute. The District Court granted summary judgment for petitioners and dismissed the action. The Court of Appeals reversed and remanded, holding that § 1988 covered the actions taken by respondents subsequent to the filing of the administrative complaint, and that § 1988 allowed a separate action for attorney's fees.

Held:

1. Under § 1988's plain language and legislative history, only a court in an action to enforce one of the civil rights laws listed in § 1988 may

award attorney's fees. Here, the action for attorney's fees is not, and was never, an action to enforce any of those laws. Pp. 11–15.

2. Respondents are not entitled to claim attorney's fees by virtue of their proposed complaint and motion to intervene in the unrelated action. They did not seek attorney's fees *in that action*, but rather agreed that their Title VI claims in the proposed complaint would be dismissed. The court that considered the attorney's fees claim was not adjudicating an action to enforce Title VI. Pp. 15–16.

769 F. 2d 1025, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, POWELL, STEVENS, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 16.

Lacy H. Thornburg, Attorney General of North Carolina, argued the cause for petitioners. With him on the briefs was *James B. Richmond*, Special Deputy Attorney General.

Richard J. Lazarus argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Kuhl*, and *Brian K. Landsberg*.

Michael D. Calhoun argued the cause for respondents. With him on the brief was *Alice A. Ratliff*.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether a court may award attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, in a separate federal action not to enforce any of the civil rights laws listed in § 1988, but solely to recover attorney's fees.

I

In 1957, the Durham City Council advised the North Carolina State Highway Commission of the need for a major east-west expressway in the city. North Carolina Department of Transportation and Federal Highway Administration, Final Environmental Impact Statement No. FHWA–NC–EIS–72–

13–F, Historical Resume 15 (1982). Over the years parts of this highway were completed. In 1976, petitioner North Carolina Department of Transportation (NCDOT) resumed planning an extension of the east-west highway. The proposed extension was to run through the Crest Street community, an established, predominantly black neighborhood in Durham. The extension would have displaced the community park and church and many of the residents of the neighborhood. Respondents, Residents of Crest Street Community and the Save Our Church and Community Committee, two unincorporated associations, retained the North Central Legal Assistance Program to represent them in regard to the proposed highway extension. Despite respondents' opposition to the extension plans, petitioners issued a revised draft Environmental Impact Statement that continued to propose that the extension run through the Crest Street community. App. 57.

The costs of the proposed extension were to be covered in large part by federal funds. Title VI of the Civil Rights Act of 1964 prohibits "any program or activity receiving Federal financial assistance" from discriminating on the basis of race, color, or national origin, 42 U. S. C. § 2000d, and directs each federal agency authorized to extend federal financial assistance to issue regulations to effectuate this mandate, § 2000d–1. Compliance with § 2000d may be effected by the termination of federal funds, or by any other means authorized by law; however, "no such action shall be taken until the department or agency concerned has advised the [recipient] of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." § 2000d–1.

Pursuant to Title VI, the Department of Transportation (DOT) promulgated regulations requiring recipients of federal funds to provide assurances of compliance, periodic compliance reports, and access to information relevant to compliance. 49 CFR § 21.9 (1985). DOT regulations also state

that "[a]ny person who believes himself or any specific class of persons to be subjected to discrimination prohibited by [Title VI and the DOT regulations] may . . . file with the Secretary a written complaint." § 21.11(b). The Secretary is required to investigate "whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part." § 21.11(c).

In September 1978, respondents filed a complaint with DOT. App. 73–89. Respondents challenged petitioners' proposed extension as violative of Title VI, and requested that NCDOT be prohibited from planning or constructing the proposed highway through the Crest Street community. DOT conducted an investigation, met with representatives of petitioners and of respondents, and obtained documents from petitioners and respondents. In February 1980 the DOT Director of Civil Rights informed NCDOT that based on DOT's "preliminary judgments," there was "reasonable cause to believe that the construction of the Expressway along the alignment proposed in the Draft [Environmental Impact Statement] would constitute a prima facie violation of Title VI and, in particular, Section 21.5(b)(3) of our Departmental Title VI regulation." *Id.*, at 97–99. DOT urged petitioners to attempt to negotiate a resolution to the controversy. After negotiations spanning 15 months, in February 1982, petitioners, respondents, and the city of Durham reached a preliminary agreement on the highway design and mitigation of the adverse impact of the project, but continued to negotiate toward a final plan.

Since 1973, construction of the highway extension had been enjoined by an order entered in the unrelated proceedings in *ECOS, Inc.* v. *Brinegar*, No. C–352–D–72 (MDNC, Feb. 20, 1973). The plaintiffs in *ECOS* were a nonprofit educational ecological organization, an association of Duke University students and some of its members, and two Durham residents. The action alleged violations of the Federal-Aid Highway Act, 23 U. S. C. §§ 128, 138, the Department of

Transportation Act of 1966, 49 U. S. C. App. § 1653(f), and the National Environmental Policy Act of 1969, 42 U. S. C. § 4332. The order enjoined construction until the defendants, state and federal transportation officials and a construction company, achieved full compliance with the above statutes. In August 1982 NCDOT moved to dissolve the *ECOS* injunction. Respondent Crest Street Community Council, Inc., and an individual Crest Street resident moved to intervene in the *ECOS* action and filed a proposed complaint asserting Title VI violations. App. 103–107. While the motion to intervene was pending, petitioners and respondents continued negotiations, and reached agreement on a Final Mitigation Plan. On December 14, 1982, the District Court entered a consent judgment in the *ECOS* action. The consent judgment dissolved the injunction and dismissed the action. It also dismissed with prejudice respondents' Title VI claims on the condition that petitioners implement the Final Mitigation Plan, although the District Court had never ruled on the Crest Street Community Council, Inc., motion to intervene. The following day the Final Mitigation Plan was formally executed by petitioners, respondents, and the city of Durham.

The Plan set out comprehensive requirements for NCDOT and the city of Durham to mitigate the impact of the highway. Under the Plan NCDOT agreed to move the proposed highway right-of-way and modify an interchange so as to preserve the community church and park. The Plan also required NCDOT and the city of Durham to develop and provide a new park and community site in the same area. Respondents' counsel had spent more than 1,200 hours over the course of five years on this project, preparing the administrative complaint, assisting the DOT investigation, actively participating in negotiations to resolve the dispute, and informing DOT on the progress of those negotiations. The result of this diligent labor was both substantial and concrete.

Under the Plan, respondents stated that they did not waive any right to attorney's fees, and the city of Durham and NCDOT denied liability for attorney's fees. Respondents filed an action in District Court for attorney's fees under 42 U. S. C. § 1988. On cross-motions for summary judgment, the District Court granted petitioners' motion and dismissed the action. 598 F. Supp. 258 (MDNC 1984). On appeal, the Court of Appeals reversed and remanded. 769 F. 2d 1025 (CA4 1985). The Court of Appeals concluded that the explicit language of § 1988 allowing recovery of attorney's fees by a "prevailing party" in a "proceeding to enforce . . . [T]itle VI of the Civil Rights Act of 1964" covered the actions taken by respondents subsequent to the filing of the administrative complaint. *Id.*, at 1028. The Court of Appeals then considered whether respondents could bring an independent action "solely to recover fees for an administrative complaint that has already been settled." *Id.*, at 1033. The Court of Appeals held that § 1988 allowed a separate action for fees, although it acknowledged the contrary holdings of other courts. See *Horacek* v. *Thone*, 710 F. 2d 496, 499 (CA8 1983); *Estes* v. *Tuscaloosa County*, 696 F. 2d 898, 901 (CA11 1983); *Latino Project, Inc.* v. *City of Camden*, 701 F. 2d 262 (CA3 1983). We granted certiorari, to resolve the Circuit conflict, 474 U. S. 1049 (1986), and now reverse.

II

In cases in which civil rights litigation was preceded by administrative proceedings, this Court has had occasion to consider whether the court in the civil rights action could award attorney's fees for time spent in the particular administrative processes. *Webb* v. *Dyer County Board of Education*, 471 U. S. 234, 241 (1985) (state tenure rights hearing is not a proceeding to enforce 42 U. S. C. § 1983); *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54 (1980) (mandatory state employment discrimination proceedings are proceedings to enforce Title VII). This case presents a question similar

to those raised in *Webb* and *Carey:* whether negotiations subsequent to the filing of a Title VI administrative complaint are, under § 1988, "proceedings to enforce" Title VI. This case also presents a question that had not been posed by our prior § 1988 cases: whether attorney's fees under § 1988 can be sought in a court action *other than* litigation in which a party seeks to enforce the civil rights laws listed in § 1988. Because our resolution of the latter question resolves this case, we do not reach the former.

In pertinent part, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, provides:

> "In any action or proceeding to enforce a provision of . . . [T]itle VI of the Civil Rights Act of 1964 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The plain language of § 1988 suggests the answer to the question whether attorney's fees may be awarded in an independent action which is not to enforce any of the civil rights laws listed in § 1988. The section states that *in the action or proceeding to enforce* the civil rights laws listed—42 U. S. C. §§ 1981, 1982, 1983, 1985, 1986, Title IX, or Title VI—*the court* may award attorney's fees. The case before us is not, and was never, an action to enforce any of these laws. On its face, § 1988 does not authorize a court to award attorney's fees except in an action to enforce the listed civil rights laws.

The legislative history of § 1988 supports the plain import of the statutory language. As we have noted before, the legislative history is replete with references to "the enforcement of the civil rights statutes 'in suits,' 'through the courts' and by 'judicial process.'" *Webb* v. *Dyer County Board of Education, supra,* at 241, n. 16 (quoting S. Rep. No. 94–1011, pp. 2, 6 (1976); H. R. Rep. No. 94–1558, p. 1 (1976)). Moreover, to support its statement that "parties may be considered to have prevailed when they vindicate rights through a

consent judgment or without formally obtaining relief," the Senate Report cited cases that involved at a minimum the filing of a judicial complaint. S. Rep. No. 94–1011, at 5 (citing *Kopet* v. *Esquire Realty Co.*, 523 F. 2d 1005 (CA2 1975); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (CA8 1970); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F. 2d 981 (CA3 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (Ore. 1969); *Aspira of New York, Inc.* v. *Board of Education of New York City*, 65 F. R. D. 541 (SDNY 1975)). The House Report, even while it stressed that "'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits," clearly contemplated that parties obtaining fees would have initiated civil rights litigation:

> "If *the litigation* terminates by consent decree, for example, it would be proper to award counsel fees. A 'prevailing' party should not be penalized for seeking an *out-of-court* settlement, thus helping to lessen docket congestion. Similarly, *after a complaint* is filed, a *defendant* might voluntarily cease the unlawful practice." H. R. Rep. No. 94–1558, at 7 (citations omitted; emphasis supplied).

As in the Senate Report, each of the cases cited by the House Report to support the above statements involved, at a minimum, the filing of a judicial complaint. See *Evers* v. *Dwyer*, 358 U. S. 202 (1958); *Incarcerated Men of Allen County Jail* v. *Fair*, 507 F. 2d 281 (CA6 1974); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377 (CA4 1972); *Lea* v. *Cone Mills Corp.*, 438 F. 2d 86 (CA4 1971); *Parham, supra; Parker* v. *Matthews*, 411 F. Supp. 1059 (DC 1976); *Aspira, supra.*

We recognize that dicta in opinions of this Court suggest that the authorization of attorney's fee awards only by a court in an action to enforce the listed civil rights laws would be anomalous. See *Carey*, 447 U. S., at 65–66. But see *id.*, at 71 (STEVENS, J., concurring in judgment) ("Whether Congress intended to authorize a separate federal action solely

to recover costs, including attorney's fees, . . . is not only doubtful but is a question that is plainly not presented by this record"). See also *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 451, n. 13 (1982). But if one must ignore the plain language of a statute to avoid a possibly anomalous result, "'[t]he short answer is that Congress did not write the statute that way.'" *Garcia* v. *United States*, 469 U. S. 70, 79 (1984), quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (in turn quoting *United States* v. *Naftalin*, 441 U. S. 768, 773 (1979)). The legislative history clearly envisions that attorney's fees would be awarded for proceedings only when those proceedings are part of or followed by a lawsuit.

Moreover, we now believe that the paradoxical nature of this result may have been exaggerated. There are many types of behavior that may lead others to comply with civil rights laws. For example, an employee, after talking to his lawyer, may choose to discuss hiring or promotion practices with an employer, and as a result of this discussion the employer may alter those practices to comply more fully with employment discrimination laws. In some sense it may be considered anomalous that this employee's initiative would not be awarded with attorney's fees. But an award of attorney's fees under § 1988 depends not only on the results obtained, but also on what actions were needed to achieve those results. It is entirely reasonable to limit the award of attorney's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in court.

We have also suggested in past cases that today's holding would create an incentive to file protective lawsuits in order to obtain attorney's fees. See *Carey*, *supra*, at 66, n. 6. Upon reflection, however, we think that the better view was expressed by our conclusion in *Webb*, 471 U. S., at 241, n. 15, that "competent counsel will be motivated by the interests of the client to pursue . . . administrative remedies when they are available and counsel believes that they may prove

successful." An interpretation of § 1988 cannot be based on the assumption that "an attorney would advise the client to forgo an available avenue of relief solely because § 1988 does not provide for attorney's fees . . . ." *Ibid.* Moreover, our holding creates a legitimate incentive for potential civil rights defendants to resolve disputes expeditiously, rather than risk the attorney's fees liability connected to civil rights litigation.

A court hearing one of the civil rights claims covered by § 1988 may still award attorney's fees for time spent on administrative proceedings to enforce the civil rights claim prior to the litigation. See *Carey*, *supra* (so holding under identical language of Title VII). Moreover, even if the prior proceeding is not a "proceeding to enforce" one of the § 1988 civil rights laws, the "discrete portion of the work product from the administrative proceedings" that "was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement" can be part of the attorney's fees awarded under § 1988. *Webb*, *supra*, at 243; see also *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). Under the plain language and legislative history of § 1988, however, only a court in an action to enforce one of the civil rights laws listed in § 1988 may award attorney's fees.

III

The Court of Appeals, in an alternative response to the argument that § 1988 does not authorize fee awards in actions other than those to enforce the listed civil rights laws, stated that "[e]ven if some type of court action were required to trigger § 1988's fee provision, [respondents] would still have a claim to fees by virtue of their proposed complaint and motion to intervene in the *ECOS* action." 769 F. 2d, at 1034. This argument misconstrues the flaw in respondents' claim for fees. Whatever respondents' role in the *ECOS* action, and whether or not the *ECOS* action was to enforce Title VI, respondents did not seek attorney's fees *in that action.* Respondents instead agreed that their Title VI claims in their

proposed complaint would be dismissed, and brought a completely independent action for attorney's fees. The court that considered the attorney's fees claim was not in an action to enforce Title VI. Whether the court in the *ECOS* action could have awarded attorney's fees to respondents, while doubtful,* is irrelevant. The court that did consider the claim was not authorized under § 1988 to award attorney's fees.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Today the Court holds that litigants, who seek to enforce their rights under Title VI of the Civil Rights Act of 1964 and who prevail in an administrative proceeding expressly created to effectuate enforcement of those rights, cannot bring an action under 42 U. S. C. § 1988 to recoup the costs incurred, including a reasonable attorney's fee for the services that produced the administrative victory. What today's holding ensures is that no challenge brought under a statute covered by § 1988 will ever be settled *without* a court action. Because this holding ignores the past decisions of the Court, the purpose of § 1988, and the burden it places on federal district courts, I respectfully dissent.

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*Respondents allege that although the District Court did not rule on respondents' motion, they were made parties to the *ECOS* action by signing the consent judgment, which dismissed with prejudice their Title VI claims. Assuming, *arguendo*, that respondents were made parties to the *ECOS* litigation, the District Court identified only 37 hours of work that was related to the *ECOS* litigation. 598 F. Supp. 258, 266 (MDNC 1984). As to this time, the District Court determined that respondents were not entitled to attorney's fees because they were not prevailing parties in the *ECOS* litigation. The motion to intervene was never ruled on by the *ECOS* court; respondents obtained neither an injunction of the highway extension nor a declaration that petitioners violated Title VI; and the *ECOS* motion had little catalytic effect on the Final Mitigation Plan, the completion of which was imminent before the *ECOS* motion. *Ibid.*

I

The Court holds that the plain language of § 1988 reveals that an award of attorney's fees is authorized only for parties who substantially prevail on a civil rights claim *in a lawsuit.* This result—with its attendant unnecessary and inefficient consequences—is not compelled by the plain language of the statute.

Section 1988 provides:

> "In any action or proceeding to enforce . . . title VI of the Civil Rights Act of 1964 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

From this, the Court reasons that § 1988, by its own terms, contemplates that only "the court" which has also entertained the substantive claim of a civil rights violation may award attorney's fees. Plaintiffs who fail to file a lawsuit and who prevail before an administrative agency are therefore prohibited from bringing an independent action for fees.

Certainly nothing in the language of § 1988 requires this outcome. Claimants such as the respondents in this case plainly seek to vindicate their rights under Title VI when they bring an action in federal court to obtain attorney's fees for an administrative victory. The lawsuit for fees which follows the successful pursuit of a claim at the administrative level is part of the "proceeding to enforce" Title VI within the meaning of § 1988, whether it is filed before or after the administrative battle is won. It is still *"the court"* that awards the fees. The so-called independent action for attorney's fees is, as a logical matter, part of the "proceeding to enforce" the civil rights claim involved.

Respondents must pursue in court an award to which they are entitled in enforcing Title VI because the primary adjudicator of the violations, the administrative agency, did not have authority to provide the full range of relief attainable under law. They claim nothing more than the relief

available for Title VI claims upon which they have already prevailed. The attorney's fee provision of § 1988 provides authority for the fee award by using language broad enough to encompass work done in administrative proceedings and specifies the procedure for obtaining such an award, namely, petition to a court.

II

The Court's position is at odds with the purpose underlying § 1988. Section 1988 is designed to "promote the enforcement of the Federal civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens." H. R. Rep. No. 94–1558, p. 9 (1976). By its enactment, Congress recognized that "fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 94–1011, p. 2 (1976). As this case demonstrates, important civil rights are often vindicated in administrative proceedings. Fee awards are equally essential to effective use of the administrative and judicial fora.

Congress enacted § 1988 specifically in response to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). In *Alyeska*, the respondent had succeeded in enjoining the Department of Interior from issuing the permits required for the construction of an oil pipeline. Although Congress ultimately amended the Mineral Leasing Act to allow issuance of the permits in question, the Court of Appeals granted the respondent organization's application for attorney's fees on the ground that it had acted as a "private attorney general" advancing a high priority congressional policy. *Wilderness Society* v. *Morton*, 161 U. S. App. D. C. 446, 450–451, 495 F. 2d 1026, 1030–1031 (1974).

This Court reversed that decision, holding that use of the "private attorney general" theory was inappropriate and that "legislative guidance" was necessary before a court could en-

gage in fee shifting. *Alyeska, supra,* at 247. One consequence of this decision was that plaintiffs could no longer recover attorney's fees after prevailing on certain civil rights claims.

As a result, Congress became concerned that private litigants would be completely unable to protect their civil rights without "the opportunity to recover what it costs them to vindicate these rights in court." S. Rep. No. 94–1011, *supra,* at 2. The Senate Report makes this plain:

> "[T]he Committee has found that fee awards are essential if the Federal statutes to which [§ 1988] applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." *Id.,* at 5 (footnote omitted).

Congress recognized that the promise of a forum for vindication of one's civil rights is meaningless absent an ability to obtain adequate representation, and § 1988 was therefore enacted to "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's . . . decision in *Alyeska* . . . ." *Id.,* at 1.

The congressional purpose visible in the legislative history of § 1988 militates in favor of allowing an individual action for fees following success in an administrative proceeding to enforce one of the civil rights statutes covered by § 1988. An indigent citizen who cannot afford to hire a lawyer to sue to enforce the civil rights laws is similarly unable to pursue relief before an administrative agency. Allowing an independent action for fees furthers the legislative policy of ensuring statutory compliance by encouraging "vigorous enforcement" actions by private citizens. *Id.,* at 4.

III

In light of the language and legislative history of § 1988, it is not surprising that past decisions of this Court rejected

today's holding. In *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54 (1980), we held that a state administrative procedure to enforce Title VII constitutes an "action or proceeding" as that phrase is utilized in the Title VII fees provision, 42 U. S. C. § 2000e–5(k), and that the complainant was therefore entitled to attorney's fees for work done in the course of that proceeding. In addition, the Court stated that the availability of attorney's fees in a federal court should not depend upon whether a Title VII claimant prevailed in federal court or before an administrative body. The Court reasoned:

> "It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that § 706(f)(1)'s authorization of a civil suit in federal court *encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.*" *Id.*, at 66 (footnote omitted; emphasis added).

More recently in *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445 (1982), the Court explained its analysis in *Carey*, *supra*, observing that "a claimed entitlement to attorney's fees is sufficiently independent of the merits action under Title VII to support a federal suit 'solely to obtain an award of attorney's fees for legal work done in state and local proceedings.'" 455 U. S., at 451–452, n. 13 (quoting *Carey*, *supra*, at 66).

Carey cannot be distinguished from the case before us. Section 1988 employs phraseology virtually identical to that

used in the Title VII fee provision at issue in *Carey*,[1] and the relevant Committee Reports underline Congress' intent to model § 1988 after the Title VII fee provision.[2] Respondents herein prevailed in a federal administrative proceeding to enforce Title VI, and, on the reasoning of *Carey*, they are entitled to reasonable attorney's fees.

IV

A most troubling effect of the Court's decision is the pointless burden it will place upon federal district courts. Claimants unfettered by a requirement that they exhaust administrative remedies—Title VI claimants are included in this category[3]—will immediately file suit in federal court to protect any possible claim for attorney's fees should they subsequently prevail.

In *Webb* v. *Dyer County Board of Education*, 471 U. S. 234 (1985), the Court held that § 1988 does not mandate an automatic award of fees to a civil rights claimant who prevails in an administrative proceeding. Specifically, the Court required that the proceeding involved be one "to enforce" the underlying civil rights statute. But here the Court has not determined whether the administrative scheme promul-

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[1] Compare 42 U. S. C. § 2000e–5(k) ("In any action or proceeding under [Title VII] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs") with 42 U. S. C. § 1988 ("In any action or proceeding to enforce a provision of . . . Title VI of the Civil Rights Act of 1964 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs").

[2] See, *e. g.*, S. Rep. No. 94–1011, pp. 4 and 6 (1976) (Title VII cases contain "appropriate [standards]" for the application of § 1988); H. R. Rep. No. 94–1558, p. 8 (1976) (same). See also *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 70–71, n. 9 (1980) (Section 1988 is legislation similar in purpose and design to Title VII's fee provision).

[3] See *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582, 593–595 (1983) (WHITE, J.); *Cannon* v. *University of Chicago*, 441 U. S. 677, 710–716 (1979); *University of California Regents* v. *Bakke*, 438 U. S. 265, 419–421, and n. 28 (1978) (STEVENS, J.).

gated by the United States Department of Transportation is a "proceeding to enforce . . . Title VI." Instead the Court sweeps aside the possibility of fees in *any* administrative proceeding—whether mandatory or optional, whether integral or peripheral to an enforcement scheme—unless the complainant files a concurrent lawsuit alleging the same civil rights violations. Unless such a complaint is filed in court, success at the administrative level *automatically* precludes any subsequent action for fees.

This bright-line solution to the problem of when fees may be awarded for work done in an administrative proceeding is achieved at great cost. First, the Court's rule allows differential treatment of civil rights claimants who prevail at the administrative level solely as a function of the existence (or lack thereof) of a civil complaint. Unfairness results when "complainants with meritorious claims who succeed in . . . administrative proceedings are denied any possible action for attorney's fees in federal court, while those claimants with equally or less meritorious claims who lose in administrative proceedings but happen to prevail in federal court are granted attorney's fees." *Blow* v. *Lascaris*, 523 F. Supp. 913, 917 (NDNY 1981), aff'd, 668 F. 2d 670 (CA2), cert. denied, 459 U. S. 914 (1982).[4]

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[4]The Court points out that "[t]here are many types of behavior that may lead others to comply with civil rights laws," *ante*, at 14, such as informally discussing employment practices with an employer after consulting an attorney. The suggestion is that it is no more logically anomalous to refuse to provide fees for an informal initiative than to refuse to do so for work in a successful administrative proceeding. However, Congress has not drawn the line between court action and all other activity, but has chosen to allow fees for participation in "proceeding[s]" while neglecting to do so for informal initiatives. Under these circumstances, it *is* anomalous to award fees to administrative participants who file civil complaints while withholding fees from identically situated administrative participants who do not. The proper analogy, using the Court's example, would be an award of fees for informal initiatives which occur while a complaint is pending and a refusal to award fees for informal initiatives when no civil action has been filed.

Second, despite the Court's statement to the contrary, the new rule *will* "create an incentive to file protective lawsuits in order to obtain attorney's fees." *Ante*, at 14. Of course, as the Court observes, "competent counsel will . . . pursue . . . administrative remedies when they are available and counsel believes they may prove successful," *Webb*, 471 U. S., at 241, n. 15. Simultaneously, however, counsel will file a court action to ensure that he or she will be eligible for an attorney's fee even if success comes in the administrative forum. One need not assume that "an attorney would advise the client to forgo an available avenue of relief solely because § 1988 does not provide for attorney's fees," *ibid.*, to conclude that this holding will encourage responsible attorneys to file civil complaints. No avenue of relief need be forgone; rather two avenues must be concurrently (or alternately) pursued.[5]

Moreover, Congress has explicitly recognized that complainants who seek to vindicate their civil rights are often unable to obtain representation without the prospect that an attorney's fee will accompany a successful outcome.[6] This is

[5] As a practical matter, the Court's position will lead civil rights claimants to do the following: (1) file a federal civil action, (2) pursue the available administrative agency remedy, (3) obtain a stay from the federal district court, and (4) return to federal court to file a fee petition after prevailing before the agency. Under these circumstances, there will rarely be any doubt that some portion of the work before the agency was "both useful and of a type ordinarily necessary" to successful litigation of the case. *Webb* v. *Dyer County Board of Education*, 471 U. S., at 243. Consequently, some fee award should ordinarily be allowed.

The use of the above procedure should not be encouraged; it is wasteful and not required by the statutory language.

[6] This concern is echoed many times over in the legislative history of the Civil Rights Attorney's Fees Awards Act. See 122 Cong. Rec. 35128 (1976) (remarks of Rep. Seiberling) ("Unless you can get adequate legal representation, the civil rights laws are just a lot of words"); *id.*, at 33313 (remarks of Sen. Tunney) ("Unless effective ways are found to provide equal legal resources, the Nation must expect its most basic and fundamental laws to be objectively repealed by the economic fact of life that the people these laws are meant to benefit and protect cannot take advantage of them. Attorneys' fees have proved one extremely effective way to provide these equal legal resources . . .").

as true for complainants seeking relief at the administrative level as it is for those filing federal lawsuits. It is entirely reasonable for an attorney whose only source of payment will be court-awarded fees to select that forum rather than the administrative forum, particularly if the only other option is failing to pursue the case at all. As the Court stated in *Carey*, "[t]he existence of an incentive to get into federal court, such as the availability of a fee award, would ensure that almost all Title VII complainants would abandon state proceedings as soon as possible." 447 U. S., at 66, n. 6. Now the Title VI claimant may choose to bypass administrative mechanisms altogether, since their exhaustion is not mandatory, and file a complaint in federal court to assure himself or herself of attorney's fees upon prevailing. The court's inability to entertain a separate action for fees "will promote such a bypass." Parness & Woodruff, Federal District Court Proceedings to Recover Attorney's Fees for Prevailing Parties on Section 1983 Claims in State Administrative Agencies, 18 Ga. L. Rev. 83, 95 (1983).

Nor will this holding allow the courts to evade a series of determinations as to which administrative schemes create "proceeding[s] to enforce" the civil rights statutes covered by § 1988. Once this decision is handed down, "competent counsel," *Webb*, *supra*, at 241, n. 15, will file a civil complaint *and* seek relief at the administrative level in any civil rights action included in § 1988. When these complainants return to federal court after pursuit of administrative remedies, the courts will then be forced to confront the question of which administrative schemes constitute "proceeding[s] to enforce" the relevant civil rights statutes.

Finally, the holding will not, as the Court suggests, "creat[e] a legitimate incentive for potential civil rights defendants to resolve disputes expeditiously, rather than risk the attorney's fees liability connected to civil rights litigation." *Ante*, at 15. The Court incorrectly assumes that claimants seeking administrative relief will not file protective civil com-

plaints. In fact, plaintiffs' attorneys will file complaints that lie dormant during the course of any administrative proceedings, so that they may ultimately claim either that they were engaged in a "proceeding to enforce" the statute in question under § 1988, or that the time spent in the administrative forum was "both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement." *Webb*, *supra*, at 243. See also *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). Thus, after the decision in this case, defendants will remain at risk of incurring liability for fees while the administrative process in question runs its course.

Initial resort to the administrative forum and the settlement of claims by the agency should be encouraged, not discouraged. Congress explicitly stated that "[a] 'prevailing party' should not be penalized for seeking an out-of-court settlement, thus helping to lessen [court] congestion." H. R. Rep. No. 94–1558, p. 7 (1976). Although this statement was made with reference to the postcivil complaint settlement process, its logic has equal force where utilization of the administrative process could eliminate the need for court action.

In my view, it is pointless formalism to treat differently a federal action stayed until completion of the administrative process and resuscitated for a fee award, and a federal action filed after administrative victory.[7]

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[7] The Court fails to reach respondents' claim that they are entitled to fees by virtue of their proposed complaint, motion to intervene, and participation in the consent judgment in *ECOS, Inc.* v. *Brinegar*, No. C–352–D–72 (MDNC, Feb. 20, 1973). The Court reasons that, even if the District Court entertaining the *ECOS* action could have awarded fees to respondents, this independent action for fees cannot survive because the court that entertains the initial civil rights complaint is the *only* court that may award attorney's fees to a successful complainant.

It is worth noting that the parties agreed in the consent judgment that respondents' Title VI claim would be dismissed with prejudice, but that this disposition was *without prejudice* to respondents' right to pursue

V

I can see little good and some significant harm emerging from today's decision. Civil rights complainants are now on notice that they must file a civil lawsuit to have any hope of obtaining attorney's fees upon prevailing in an administrative enforcement proceeding. The bad news for federal district courts is that counsel will inevitably file such suits. Because the language and purpose of § 1988 allow an independent action to obtain fees for work done at an administrative proceeding to enforce Title VI, and because I believe the contrary holding has mischievous consequences, I dissent.

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attorney's fees. Hence, the Court holds not only that prevailing complainants must file a civil complaint in order to obtain fees, but also that parties may not *agree* in one action to allow pursuit of fees in a separate action.

O'CONNOR ET UX. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85–558. Argued October 14, 1986—Decided November 4, 1986*

Section 1 of Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty provides that the Panama Canal Commission and its contractors "are exempt from payment in the Republic of Panama of all taxes . . . on their activities or property." The first sentence of § 2 of Article XV provides that "United States citizen employees . . . shall be exempt from any taxes . . . on income received as a result of their work for the Commission," and the second sentence exempts such employees "from payment of taxes . . . on income derived from sources outside the Republic of Panama." Section 3 provides that such employees "shall be exempt from taxes . . . on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their . . . work with the Commission." Petitioners, United States citizen employees of the Panama Canal Commission and their spouses, sought refunds of United States income taxes collected on salaries paid by the Commission for certain years, contending that § 2 of Article XV constitutes an express exemption of those salaries from both Panamanian and United States taxation. The Claims Court agreed, but the Court of Appeals reversed.

Held: Article XV applies only to Panamanian taxes, and hence petitioners are not entitled to refunds of United States income taxes paid. Section 1 of Article XV establishes the context for the discussion of tax exemption in the entire Article, so that when §§ 2 and 3 state that "United States citizen employees . . . shall be exempt" from taxes they are understood to be dealing only with taxes payable in Panama. If the first sentence of § 2 were interpreted to refer to United States as well as Panamanian taxes, then the second sentence and § 3 would also do so, with the implausible consequence that United States citizen employees would be exempt not only from United States income taxes on their earnings from the Commission but also from such taxes on income from sources outside Panama and from all United States gift and inheritance taxes. Not only is limitation of Article XV to Panamanian taxes in accord with

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*Together with No. 85–559, *Coplin et ux.* v. *United States*, and No. 85–560, *Mattox et ux.* v. *United States*, also on certiorari to the same court.

the Executive Branch's consistent application of the Agreement, but that application has gone unchallenged by Panama. Pp. 30–35.

761 F. 2d 688, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

Carter G. Phillips argued the cause for petitioners in all cases. On the briefs were *Andrew C. Barnard, David J. Kiyonaga, Allan I. Mendelsohn, Marvin I. Szymkowicz, John C. Morrison, George S. Barnard, Michael C. Pierce,* and *Dwight A. McKabney.*

Jerrold J. Ganzfried argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Olsen, Deputy Solicitor General Wallace, Michael L. Paup, David English Carmack,* and *Abraham D. Sofaer.*

JUSTICE SCALIA delivered the opinion of the Court.

The petitioners, United States citizen employees of the Panama Canal Commission and their spouses, seek refunds of income taxes collected on salaries paid by the Commission between 1979 and 1981. We granted certiorari to resolve conflicting appellate interpretations of an international agreement. 474 U. S. 1050 (1986).

From 1904 to 1979, the United States exercised sovereignty over the Panama Canal and the surrounding 10-mile-wide Panama Canal Zone under the Isthmian Canal Convention, 33 Stat. 2234. On September 7, 1977, the United States and Panama signed the Panama Canal Treaty, T.I.A.S. No. 10030, which was ratified by the Senate on April 17, 1978, and took effect on October 1, 1979. The Treaty transferred to Panama sovereignty over the Canal and Zone, but gave the United States the right to operate the Canal until December 31, 1999. The vehicle for United States administration of the Canal is the Panama Canal Commission, a United States Government agency supervised by a Board of nine members, four of whom are Panamanian nationals proposed by the Government of Panama. See 22

U. S. C. §§ 3611, 3612; Panama Canal Treaty, Art. III, § 3, T.I.A.S. No. 10030 (hereinafter Treaty).

Article III of the Treaty, entitled "Canal Operation and Management," specifies that "the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article . . . ." Treaty, Art. III, § 9. The latter agreement, signed simultaneously with the Treaty, see Panama Canal Treaty: Implementation of Article III, Sept. 7, 1977, T.I.A.S. No. 10031 (hereinafter Agreement), contains the provision that gives rise to the present dispute. Article XV of the Agreement, entitled "Taxation," provides as follows:

> "1. By virtue of this Agreement, the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.
>
> "2. United States citizen employees and dependents shall be exempt from any taxes, fees or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.
>
> "3. United States citizen employees and dependents shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.
>
> "4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article."

The petitioners contend that § 2 of this Article constitutes an express exemption of their Commission salaries from both Panamanian and United States taxation. See 26 U. S. C.

§ 894(a) ("Income of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle"). The Claims Court agreed, 6 Cl. Ct. 115 (1984), but was reversed by a five-judge panel of the Federal Circuit. 761 F. 2d 688 (1985). In a substantively identical case, the Eleventh Circuit has ruled for the taxpayers. *Harris* v. *United States*, 768 F. 2d 1240 (1985), cert. pending, No. 85–1011. The same issue is presented in numerous cases still pending in the lower courts.[1]

We agree with the Federal Circuit. The first section of Article XV, which confers upon the Commission and its contractors an exemption "from payment *in the Republic of Panama* of all taxes" (emphasis added), establishes the context for the discussion of tax exemptions in the entire Article—so that when §§ 2 and 3 state that "United States citizen employees . . . shall be exempt" from taxes they are understood to be dealing only with taxes payable in Panama. In that regard the structure of Article XV is similar to that of Article XVI, which in most of its sections speaks generally of import duties, but is understood to refer only to *Panamanian* import duties principally because § 1 sets the stage in that fashion by referring to "the customs laws and regulations *of the*

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[1] After this case was argued, the President signed into law the Tax Reform Act of 1986, Pub. L. 99–514, 100 Stat. 2085. Section 1232(a) of that Act provides, in relevant part, that for "all taxable years whether beginning before, on, or after the date of the enactment of this Act (or in the case of any tax not imposed with respect to a taxable year, [for] taxable events after the date of enactment of this Act)," no provision of the Treaty or Agreement "shall be construed as exempting (in whole or in part) any citizen or resident of the United States from any tax under the Internal Revenue Code of 1954 or 1986." Because we find that the Agreement, properly interpreted, provides for the same result, we do not rely upon the statute, and thus avoid confronting the constitutional questions posed by retroactive income taxation. See *United States* v. *Darusmont*, 449 U. S. 292, 296–301 (1981); *Welch* v. *Henry*, 305 U. S. 134, 146–151 (1938).

Republic of Panama." Agreement, Art. XVI, § 1 (emphasis added).

There is some purely textual evidence, albeit subtle, of the understanding that Article XV applies only to Panamanian taxes: In conferring an exemption from property taxes, § 3 displays an assumption that only personal property within the Republic of Panama is at issue; otherwise, that significant qualification to the operation of § 3 would more naturally have been set forth as an explicit limitation ("personal property *within the territory of the Republic of Panama*, whose presence there," etc.) rather than being referred to incidentally in the modifying clause ("personal property, whose presence within the territory of the Republic of Panama," etc.). And the assumption that only personal property within Panama is at issue in turn reflects the more fundamental assumption that only *Panamanian* personal property taxes are being addressed.

More persuasive than the textual evidence, and in our view overwhelmingly convincing, is the contextual case for limiting Article XV to Panamanian taxes. Unless one posits the ellipsis of failing to repeat, in each section, § 1's limitation to taxes "in the Republic of Panama," the Article takes on a meaning that is utterly implausible and has no foundation in the negotiations leading to the Agreement. For if the first sentence of § 2 refers to United States as well as Panamanian taxes, then the second sentence of § 2, and the totality of § 3, must do so as well—with the consequence that United States citizen employees and their dependents would be exempt not only from United States income tax on their earnings from the Commission, but also from United States income tax on all income from sources outside Panama (*e. g.*, United States bank accounts), and from all United States gift and inheritance taxes. While, as the petitioners assert, there might have been some reason why Panama would insist that its inability to tax United States citizen Commission employees upon their earnings in Panama be matched by a detraction

from the United States' sovereign power to tax those same earnings, there is no conceivable reason why this hypothetical "your-sovereignty-for-mine" negotiating strategy would escalate into a demand that the United States yield more sovereign prerogatives than it was asking Panama to forgo—and no imaginable reason why the United States would accept such an escalation, producing tax immunity of unprecedented scope.

The petitioners' attempts to explain why these broader tax consequences need not follow from their interpretation are unpersuasive. With regard to the second sentence of § 2, they argue that the opening word "similarly" should be read to incorporate into that sentence the first sentence's restriction to "income received as a result of . . . work for the Commission." On this understanding, the second sentence provides a "simila[r]" tax exemption for Commission-related income "derived from sources outside the Republic of Panama," but allows both countries to tax non-Commission income. In addition to being an unnatural reading of "similarly" in this context, this interpretation is flatly inconsistent with the language of § 2. Contrary to the petitioners' tacit assumption, the first sentence contains nothing limiting the scope of its exemption to income received as a result of work for the Commission *in Panama*. A person receiving a Commission salary for work performed in, for example, Bogotá would seem plainly to qualify for exemption under this provision—rendering the second sentence, on the petitioners' understanding, superfluous. With regard to § 3, the petitioners assert that its reference to taxation of property "within the territory of the Republic of Panama" is sufficient to demonstrate that only Panamanian taxation is intended to be covered. But as a reading of the provision will readily demonstrate, that reference applies only to personal property taxes; there is no comparable qualification on § 3's exemption from taxes "on gifts or inheritance." That is limited, if at all, only by the implication that Panamanian

taxes alone are at issue. In sum, we find the verbal distortions necessary to give plausible content, under the petitioners' theory, to the second sentence of §2 and §3, far less tolerable than the acknowledgment of ellipsis which forms the basis of the Government's interpretation.

Not only is limitation of Article XV to Panamanian taxes in accord with the consistent application of the Agreement by the Executive Branch—a factor which alone is entitled to great weight, see *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 184–185 (1982)—but that application has gone unchallenged by Panama. It is undisputed that, pursuant to clear Executive Branch policy, the Panama Canal Commission consistently withheld United States income taxes from petitioners and others similarly situated, see Letter from John L. Haines, Jr., Deputy General Counsel, Panama Canal Commission, to David Slacter, United States Department of Justice, Dec. 20, 1982, pp. 2–3, 1 App. in Nos. 85–504, 85–505, 85–506, and 85–507 (CA Fed.), pp. 61–62, and that Panama, which had four of its own nationals on the Board of the Commission, did not object. The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning. See *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U. S. 243, 259–260 (1984); *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U. S. 138, 158–161 (1934). Cf. Uniform Commercial Code §2–208(1) (1978).[2]

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[2] The Government has contended, here and before the Court of Appeals, that the answer to the current question is illumined, if not conclusively determined, by a February 22, 1985, diplomatic note from the Government of Panama, indicating that it shares the United States' view that Article XV pertains only to Panamanian taxation. The petitioners assert that mutual agreement between the contracting parties on interpretation cannot be dispositive of third-party rights, and that the note is in any event inadmissible on various grounds. Since we would sustain the Government's position without reference to the note, we need not resolve these disputes.

The petitioners contrast § 2 with the following provision of the simultaneously executed Agreement in Implementation of Article IV, relating to taxation of United States Armed Forces and associated civilian personnel:

> "(2) Members of the Forces or the civilian component, and dependents, shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the United States Forces or for any of the service facilities referred to in Article XI or XVIII of this Agreement. Similarly, *as is provided by Panamanian law*, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama." Panama Canal Treaty: Implementation of Article IV, Sept. 7, 1977, Art. XVI, § 2, T.I.A.S. No. 10032 (emphasis added).

The petitioners contend that the variation in the phraseology of the two provisions demonstrates that the taxation provisions of the Article III Agreement were meant to be bilateral. We think not. It would be another matter if the variation at issue were alteration of the phrase "Panamanian taxes" in one agreement to merely "taxes" in the other; there would have been no reason to object to the former formulation *except* the belief that more than Panamanian taxes were covered. Several plausible reasons, however, would justify objection to the phrase "as is provided by Panamanian law." The most obvious is the concern that the phrase would be interpreted to leave future scope of the tax exemption within Panama's unilateral control, through the amendment of its domestic law. (To be sure, that reason would seemingly call for deletion of the phrase from both agreements rather than merely the Agreement in Implementation of Article III—but perhaps it was only with respect to the latter agreement, in which Panama had steadfastly opposed the whole concept of tax exemption, that unilateral Panamanian action was feared.) The surmise that the reason for deletion of the phrase in the Article III Agreement was its implication that

only Panamanian taxes were covered would perhaps be reasonable if it were clear that the deletion was prompted by Panama. In fact, however, the deletion was made in the course of the American side's own internal drafting, before any text had even been presented to the Panamanians. (The phrase "as is provided by Panamanian law" was included in the June 26, 1977, United States draft of §2 of Art. XV, 1 App. in Nos. 85–504, 85–505, 85–506, and 85–507 (CA Fed.), p. 74, but was dropped from subsequent United States drafts, *id.*, at 77, 81.) The petitioners assert that this occurred as a consequence of the American side's knowledge that Panama would not accept a unilateral tax exemption provision and would accept a bilateral one—but they point to no Panamanian negotiating proposal supporting that speculation, which seems to us not inordinately credible on its face.

We find the petitioners' attempted reliance upon other elements of the negotiating history unavailing. While the Claims Court may have been correct that the negotiating history does not favor the Government's position sufficiently to overcome what that court regarded as a plain textual meaning in favor of the taxpayers, it certainly does not favor the taxpayers' position sufficiently to affect our view of the text. It contains, we may note, only a single (unhelpful) reference to United States income taxation—a silence that can perhaps be reconciled with the petitioners' position, but can hardly be said affirmatively to support it.

Finally, we find no significance in the fact, urged so strongly by the petitioners, that Article XV is entitled "Taxation" rather than "Panamanian Taxation." Of the 21 Articles of the Agreement, only 2—Articles V and IX—are limited by title to Panamanian subject matter, though it is plain that most are so limited in their application. See, *e. g.*, Article VII ("Water Rights"); Article XII ("Entry and Departure"); Article XVI ("Import Duties").

The judgment of the Court of Appeals is

Affirmed.

KELLY, CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL. *v.* ROBINSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85–1033. Argued October 8, 1986—Decided November 12, 1986

In 1980, respondent pleaded guilty in a Connecticut state court to a larceny charge based on her wrongful receipt of welfare benefits from the Connecticut Department of Income Maintenance. She was sentenced to a prison term, but the court suspended execution of the sentence and placed her on probation for five years. As a condition of probation, the court ordered respondent to make restitution through monthly payments to the Connecticut Office of Adult Probation until the end of her probation period. Under Connecticut statutes, restitution payments are sent to the Probation Office and are then forwarded to the victim. In 1981, respondent filed a voluntary petition under Chapter 7 of the Bankruptcy Code in Bankruptcy Court, listing the restitution obligation as a debt. The Connecticut agencies, although notified, did not file proofs of claim or objections to discharge, and the Bankruptcy Court subsequently granted respondent a discharge. She made no further restitution payments. After the Probation Office informed her that it considered the restitution obligation nondischargeable, she filed a proceeding against petitioner state officials in the Bankruptcy Court, seeking a declaration that the restitution obligation was discharged. The court concluded that even if the restitution obligation was a debt subject to bankruptcy jurisdiction, it was automatically nondischargeable under § 523(a)(7) of the Bankruptcy Code, which provides that a discharge in bankruptcy does not affect any debt that "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." The District Court adopted the Bankruptcy Court's proposed disposition of the case, but the Court of Appeals reversed.

Held: Section 523(a)(7) preserves from discharge in Chapter 7 any condition a state criminal court imposes as part of a criminal sentence. Thus, restitution obligations, imposed as conditions of probation in state criminal proceedings, are not dischargeable. Pp. 43–53.

(a) Despite the language of the earlier Bankruptcy Act of 1898 that apparently allowed criminal penalties to be discharged, most courts refused to allow a discharge to affect a state criminal court's judgment. When the present Bankruptcy Code was enacted in 1978, there was a

widely accepted judicial exception to discharge for criminal sentences, including restitution obligations imposed as part of such sentences. In construing the scope of bankruptcy codifications, this Court has followed the rule that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Midlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494. Pp. 43–47.

(b) The basis for the judicial exception here is the deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. Although it might be true that Connecticut officials could have ensured continued enforcement of the criminal judgment against respondent by objecting to discharge under the Code, that fact does not justify an interpretation of the Code that is contrary to the long-prevailing view that fines and penalties are not affected by a discharge. Moreover, reliance on a right to appear and object to discharge would create uncertainties and impose undue burdens on state officials. The prospect of federal remission of judgments imposed by state criminal judges would hamper the flexibility of those judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems. Pp. 47–49.

(c) On its face, § 523(a)(7) does not compel the conclusion that a discharge voids restitution orders imposed as conditions of probation by state courts. Nothing in the House and Senate Reports indicates that this language should be read so intrusively. Section 523(a)(7) protects traditional criminal fines. Although restitution, unlike traditional fines, is forwarded to the victim and may be calculated by reference to the amount of harm the offender has caused, neither of the statute's qualifying clauses—namely, the fines must be "to and for the benefit of a governmental unit," and "not compensation for pecuniary loss"—allows the discharge of a criminal judgment that takes the form of restitution. The decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the defendant's situation. Pp. 50–53.

776 F. 2d 30, reversed.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 53.

Carl Schuman, Assistant States' Attorney of Connecticut, argued the cause and filed briefs for petitioners.

Francis X. Dineen argued the cause and filed a brief for respondent.*

JUSTICE POWELL delivered the opinion of the Court.

We granted review in this case to decide whether restitution obligations, imposed as conditions of probation in state criminal proceedings, are dischargeable in proceedings under Chapter 7 of the Bankruptcy Code.

I

In 1980, Carolyn Robinson pleaded guilty to larceny in the second degree. The charge was based on her wrongful receipt of $9,932.95 in welfare benefits from the Connecticut Department of Income Maintenance. On November 14, 1980, the Connecticut Superior Court sentenced Robinson to a prison term of not less than one year nor more than three years. The court suspended execution of the sentence and

*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Susan Crump* and *David Crump*, and by the Attorneys General for their respective States as follows: *Charles K. Graddick* of Alabama, *Harold M. Brown* of Alaska, *Robert K. Corbin* of Arizona, *John K. Van de Kamp* of California, *Duane Woodard* of Colorado, *Charles M. Oberly III* of Delaware, *Jim Smith* of Florida, *Corinne K. A. Watanabe* of Hawaii, *James T. Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *Steven L. Beshear* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *Stephen Sachs* of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *William L. Webster* of Missouri, *Michael T. Greely* of Montana, *Brian McKay* of Nevada, *Stephen E. Merrill* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *Paul Bardacke* of New Mexico, *Lacy H. Thornburg* of North Carolina, *Nicholas J. Spaeth* of North Dakota, *Michael C. Turpen* of Oklahoma, *David B. Frohnmayer* of Oregon, *LeRoy S. Zimmerman* of Pennsylvania, *Arlene Violet* of Rhode Island, *T. Travis Medlock* of South Carolina, *W. J. Michael Cody* of Tennessee, *David L. Wilkinson* of Utah, *John J. Easton* of Vermont, *Mary Sue Terry* of Virginia, *Kenneth O. Eikenberry* of Washington, *Bronson C. La Follette* of Wisconsin, and *A. G. McClintock* of Wyoming; and for the National Governors' Association et al. by *Benna Ruth Solomon*, *Beate Bloch*, *Philip A. Lacovara*, and *Susan L. Thorner*.

placed Robinson on probation for five years. As a condition of probation, the judge ordered Robinson to make restitution[1] to the State of Connecticut Office of Adult Probation (Probation Office) at the rate of $100 per month, commencing January 16, 1981, and continuing until the end of her probation.[2]

On February 5, 1981, Robinson filed a voluntary petition under Chapter 7 of the Bankruptcy Code, 11 U. S. C. § 701 *et seq.*, in the United States Bankruptcy Court for the District of Connecticut. That petition listed the restitution obligation as a debt. On February 20, 1981, the Bankruptcy Court notified both of the Connecticut agencies of Robinson's petition and informed them that April 27, 1981, was the deadline for filing objections to discharge. The agencies did not file proofs of claim or objections to discharge, apparently because they took the position that the bankruptcy would not affect the conditions of Robinson's probation. Thus, the agencies did not participate in the distribution of Robinson's estate. On May 14, 1981, the Bankruptcy Court granted Robinson a discharge. See § 727.

At the time Robinson received her discharge in bankruptcy, she had paid $450 in restitution. On May 20, 1981, her attorney wrote the Probation Office that she believed the discharge had altered the conditions of Robinson's probation, voiding the condition that she pay restitution. Robinson made no further payments.

The Connecticut Probation Office did not respond to this letter until February 1984, when it informed Robinson that it

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[1] Connecticut Gen. Stat. § 53a-30 (1985) sets out the conditions a trial court may impose on a sentence of probation. Clause 4 of that section authorizes a condition that the defendant "make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance."

[2] There is some uncertainty about the total amount Robinson was ordered to pay. Although the judge imposed restitution in a total amount of $9,932.95, five years of payments at $100 a month total only $6,000.

considered the obligation to pay restitution nondischargeable. Robinson responded by filing an adversary proceeding in the Bankruptcy Court, seeking a declaration that the restitution obligation had been discharged, as well as an injunction to prevent the State's officials from forcing Robinson to pay.

After a trial, the Bankruptcy Court entered a memorandum and proposed order, concluding that the 1981 discharge in bankruptcy had not altered the conditions of Robinson's probation. *Robinson* v. *McGuigan*, 45 B. R. 423 (1984). The court adopted the analysis it had applied in a similar case decided one month earlier, *In re Pellegrino (Pellegrino* v. *Division of Criminal Justice)*, 42 B. R. 129 (1984). In *Pellegrino*, the court began with the Bankruptcy Code's definitional sections. First, § 101(11) defines a "debt" as a "liability on a claim." In turn, § 101(4) defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Finally, § 101(9) defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."

The *Pellegrino* court then examined the statute under which the Connecticut judge had sentenced the debtor to pay restitution. Restitution appears as one of the conditions of probation enumerated in Conn. Gen. Stat. § 53a–30 (1985). Under that section, restitution payments are sent to the Probation Office. The payments then are forwarded to the victim. Although the Connecticut penal code does not provide for enforcement of the probation conditions by the victim, it does authorize the trial court to issue a warrant for the arrest of a criminal defendant who has violated a condition of probation. § 53a–32.

Because the Connecticut statute does not allow the victim to enforce a right to receive payment, the court concluded

that neither the victim nor the Probation Office had a "right to payment," and hence neither was owed a "debt" under the Bankruptcy Code. It argued: "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." 42 B. R., at 133. The court acknowledged the tension between its conclusion and the Code's expansive definition of debt, but found an exception to the statutory definition in "the long-standing tradition of restraint by federal courts from interference with traditional functions of state governments." *Id.*, at 134. The court concluded that, even if the probation condition was a debt subject to bankruptcy jurisdiction, it was nondischargeable under § 523(a)(7) of the Code. That subsection provides that a discharge in bankruptcy does not affect any debt that "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

The court also concluded that the purpose of the restitution condition was "to promote the rehabilitation of the offender, not to compensate the victim." 42 B. R., at 137. It specifically rejected the argument that the restitution must be deemed compensatory because the amount precisely matched the victim's loss. It noted that the state statute allows an offender to "make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby," Conn. Gen. Stat. § 53a–30(a)(4) (1985). In its view, the Connecticut statute focuses "upon the offender and not on the victim, and . . . restitution is part of the criminal penalty rather than compensation for a victim's actual loss." 42 B. R., at 137. Thus, the Bankruptcy Court held that the bankruptcy discharge had not affected the conditions of Pellegrino's probation. The United States District Court for

the District of Connecticut adopted the Bankruptcy Court's proposed dispositions of *Pellegrino* and this case without alteration.

The Court of Appeals for the Second Circuit reversed. *In re Robinson*, 776 F. 2d 30 (1985). It first examined the Code's definition of debt. Although it recognized that most courts had reached the opposite conclusion, the court decided that a restitution obligation imposed as a condition of probation is a debt. It relied on the legislative history of the Code that evinced Congress' intent to broaden the definition of "debt" from the much narrower definition of the Bankruptcy Act of 1898. The court also noted that anomalies might result from a conclusion that such an obligation is not a debt. Most importantly, nondebt status would deprive a State of the opportunity to participate in the distribution of the debtor's estate.

Having concluded that restitution obligations are debts, the court turned to the question of dischargeability. The court stated that the appropriate Connecticut agency probably could have avoided discharge of the debt if it had objected under §§ 523(a)(2) or 523(a)(4) of the Code.[3] As no objections to discharge were filed, the court concluded that the State could rely only on § 523(a)(7), the subsection that provides for automatic nondischargeability for certain debts.[4]

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[3] Section 523(a)(2)(A) protects from discharge debts "for obtaining money, property, services, or an extension, renewal, or refinance of credit, by . . . false pretenses, a false representation, or actual fraud." Section 523(a)(4) protects from discharge debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Under § 523(c), debts that are protected from discharge only by § 523(a)(2) or § 523(a)(4) are discharged unless the creditor files an objection to discharge during the bankruptcy proceedings. Because Robinson was convicted of larceny, one of the debts listed in § 523(a)(4), it is quite likely that the Bankruptcy Court, if it had found the obligation to be a "debt," would have found it nondischargeable under that subsection.

[4] The requirement that creditors object to discharge is limited on its face to ¶¶ (2), (4), and (6) of § 523(a). Because ¶ 7 is not listed there, debts

The court then looked to the text of the Connecticut statute to determine whether Robinson's probation condition was "compensation for actual pecuniary loss" within the meaning of § 523(a)(7). But where the Bankruptcy Court had considered the entire state probation system, the Court of Appeals focused only on the language that allows a restitution order to be assessed "for the loss or damage caused [by the crime]," Conn. Gen. Stat. § 53a–30(a)(4) (1985). The court thought this language compelled the conclusion that the probation condition was "compensation for actual pecuniary loss." It held, therefore, that this particular condition of Robinson's probation was not protected from discharge by § 523(a)(7). Accordingly, it reversed the District Court.

We granted the State's petition for a writ of certiorari. 475 U. S. 1009 (1986). We have jurisdiction to review the judgment of the Court of Appeals under 28 U. S. C. § 1254(1). We reverse.

II

The Court of Appeals' decision focused primarily on the language of §§ 101 and 523 of the Code. Of course, the "starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring). But the text is only the starting point. As JUSTICE O'CONNOR explained last Term: "'"In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."'" *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207, 221 (1986) (quoting *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 285 (1956) (in turn quoting *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849))). In this case, we must consider the language of §§ 101 and 523

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described in that paragraph are automatically nondischargeable, under the general rule prescribed in the opening clause of § 523(a) (providing that a "discharge under section 727 . . . of this title does not discharge an individual debtor from any debt" listed in the paragraphs that follow).

in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems.

A

Courts traditionally have been reluctant to interpret federal bankruptcy statutes to remit state criminal judgments. The present text of Title 11, commonly referred to as the Bankruptcy Code, was enacted in 1978 to replace the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544.[5] The treatment of criminal judgments under the Act of 1898 informs our understanding of the language of the Code.

First, § 57 of the Act established the category of "allowable" debts. See 3 Collier on Bankruptcy ¶ 57 (14th ed. 1977). Only if a debt was allowable could the creditor receive a share of the bankrupt's assets. See § 65a. For this case, it is important to note that § 57j excluded from the class of allowable debts penalties owed to government entities. That section provided:

> "Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose." 30 Stat. 561.

Second, § 63 established the separate category of "provable" debts. See 3A Collier on Bankruptcy ¶ 63 (14th ed. 1975). Section 17 provided that a discharge in bankruptcy "release[d] a bankrupt from all of his provable debts," subject to several exceptions listed in later portions of § 17. Although § 17 specifically excepted four types of debts from discharge, it did not mention criminal penalties of any kind. The most natural construction of the Act, therefore, would

[5] Congress amended the Bankruptcy Act several times between 1898 and 1978. Congress also made numerous technical changes to the Code in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98–353, 98 Stat. 380. None of those changes are relevant to this decision.

have allowed criminal penalties to be discharged in bankruptcy, even though the government was not entitled to a share of the bankrupt's estate. Congress had considered criminal penalties when it passed the Act; it clearly made them nonallowable. The failure expressly to make them nondischargeable at the same time offered substantial support for the view that the Act discharged those penalties.

But the courts did not interpret the Act in this way. Despite the clear statutory language, most courts refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court. In the leading case, the court reasoned:

> "It might be admitted that sections 63 and 17 of the bankrupt act, if only the letter of those provisions be looked to, would embrace [criminal penalties]; but it is well settled that there may be cases in which such literal construction is not admissible. . . . It may suffice to say that nothing but a ruling from a higher court would convince me that congress, by any provision of the bankrupt act, intended to permit the discharge, under its operations, of any judgment rendered by a state or federal court imposing a fine in the enforcement of criminal laws. . . . The provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed." *In re Moore*, 111 F. 145, 148–149 (WD Ky. 1901).[6]

[6] Although courts differed as to the boundaries of the exception, particularly in cases involving nonmonetary sanctions, or sanctions imposed in civil proceedings, the reasoning of *Moore* was widely accepted. See, *e. g.*, *Parker* v. *United States*, 153 F. 2d 66, 71 (CA1 1946) (citing *Moore* and noting that "[i]t was not in the contemplation of Congress that the federal bankruptcy power should be employed to pardon a bankrupt from the consequences of a criminal offense"); *Zwick* v. *Freeman*, 373 F. 2d 110, 116 (CA2 1967) (citing *Moore* and stating that "governmental sanctions are not regarded as debts even when they require monetary payments"). We have found only one federal-court decision allowing a discharge under the

This reasoning was so widely accepted by the time Congress enacted the new Code that a leading commentator could state flatly that "fines and penalties are not affected by a discharge." See 1A Collier on Bankruptcy ¶17.13, pp. 1609–1610, and n. 10 (14th ed. 1978).

Moreover, those few courts faced with restitution obligations imposed as part of criminal sentences applied the same reasoning to prevent a discharge in bankruptcy from affecting such a condition of a criminal sentence. For instance, four years before Congress enacted the Code, a New York Supreme Court stated:

> "A discharge in bankruptcy has no effect whatsoever upon a condition of restitution of a criminal sentence. A bankruptcy proceeding is civil in nature and is intended to relieve an honest and unfortunate debtor of his debts and to permit him to begin his financial life anew. A condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt nor a debtor-creditor relationship between the persons making and receiving restitution. As with any other condition of a probationary sentence it is intended as a means to insure the defendant will lead a law-abiding life thereafter." *State* v. *Mosesson*, 78 Misc. 2d 217, 218, 356 N. Y. S. 2d 483, 484 (1974) (citations omitted).[7]

Thus, Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity.

Act to affect a sentence imposed by a criminal court. *In re Alderson*, 98 F. 588 (W. Va. 1899).

[7] For other decisions adopting this reasoning, see *People* v. *Topping Bros.*, 79 Misc. 2d 260, 262, 359 N. Y. S. 2d 985, 987–988 (Crim. Ct. 1974); *People* v. *Washburn*, 97 Cal. App. 3d 621, 625–626, 158 Cal. Rptr. 822, 825 (1979).

Just last Term we declined to hold that the new Bankruptcy Code silently abrogated another exception created by courts construing the old Act. In *Midlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494 (1986), a trustee in bankruptcy asked us to hold that the 1978 Code had implicitly repealed an exception to the trustee's abandonment power. Courts had created that exception out of deference to state health and safety regulations, a consideration comparable to the States' interests implicated by this case. We stated:

> "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, 'the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.'" *Id.*, at 501 (quoting *Swarts* v. *Hammer*, 194 U. S. 441, 444 (1904)) (citations omitted).

B

Our interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions." *Younger* v. *Harris*, 401 U. S. 37, 46 (1971). The Court of Appeals nevertheless found support for its holding in the fact that Connecticut officials probably could have ensured continued enforcement of their court's criminal judgment against Robinson had they ob-

jected to discharge under § 523(c). Although this may be true in many cases, it hardly justifies an interpretation of the 1978 Act that is contrary to the long-prevailing view that "fines and penalties are not affected by a discharge," 1A Collier on Bankruptcy ¶ 17.13, p. 1610 (14th ed. 1978).

Moreover, reliance on a right to appear and object to discharge would create uncertainties and impose undue burdens on state officials. In some cases it would require state prosecutors to defend particular state criminal judgments before federal bankruptcy courts.[8] As JUSTICE BRENNAN has noted, federal adjudication of matters already at issue in state criminal proceedings can be "an unwarranted and unseemly duplication of the State's own adjudicative process." *Perez* v. *Ledesma*, 401 U. S. 82, 121 (1971) (opinion concurring in part and dissenting in part).[9]

Also, as Robinson's attorney conceded at oral argument, some restitution orders would not be protected from discharge even if the State did appear and enter an objection to discharge. For example, a judge in a negligent homicide case might sentence the defendant to probation, conditioned on the defendant's paying the victim's husband compensation for the loss the husband sustained when the defendant killed his wife. It is not clear that such a restitution order would

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[8] In many cases, of course, principles of issue preclusion would obviate the need for the bankruptcy court to reexamine factual questions, or interpret state law. But differences between the elements of crimes and the provisions of § 523 frequently might hinder the application of issue preclusion. Moreover, apart from the burden on state officials of following and participating in bankruptcy proceedings, it is unseemly to require state prosecutors to submit the judgments of their criminal courts to federal bankruptcy courts.

[9] Of course, federal courts often duplicate state adjudicative processes when they consider petitions for the writ of habeas corpus. But explicit reference in the Constitution, Art. I, § 9, cl. 2, as well as several federal statutes, testifies to the importance of the writ of habeas corpus. Here, the case for relitigation in the federal courts rests only on the ambiguous words of the Bankruptcy Code.

fit the terms of any of the exceptions to discharge listed in § 523 other than § 523(a)(7). Thus, this interpretation of the Code would do more than force state prosecutors to defend state criminal judgments in federal bankruptcy court. In some cases, it could lead to federal remission of judgments imposed by state criminal judges.

This prospect, in turn, would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems.[10] We do not think Congress lightly would limit the rehabilitative and deterrent options available to state criminal judges.

In one of our cases interpreting the Act, Justice Douglas remarked: "[W]e do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin* v. *England*, 385 U. S. 99, 103 (1966). This Court has recognized that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief. See *Younger* v. *Harris*, *supra*, at 44–45. This reflection of our federalism also must influence our interpretation of the Bankruptcy Code in this case.[11]

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[10] Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine. See Note, Victim Restitution in the Criminal Process: A Procedural Analysis, 97 Harv. L. Rev. 931, 937–941 (1984).

[11] Justice Frankfurter advocated a similar approach to the interpretation of regulatory statutes that infringe upon important state interests:

"The task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legisla-

III

In light of the established state of the law—that bankruptcy courts could not discharge criminal judgments—we have serious doubts whether Congress intended to make criminal penalties "debts" within the meaning of § 101(4).[12] But we need not address that question in this case, because we hold that § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.

The relevant portion of § 523(a)(7) protects from discharge any debt

> "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

This language is subject to interpretation. On its face, § 523(a)(7) certainly does not compel the conclusion reached by the Court of Appeals, that a discharge in bankruptcy voids restitution orders imposed as conditions of probation by state courts. Nowhere in the House and Senate Reports is there any indication that this language should be read so intru-

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tion of this character cannot therefore be construed without regard to the implications of our dual system of government. . . . The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of congressional legislation . . . justif[ies] the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 539–540 (1947).

[12] We recognize, as the Court of Appeals emphasized, that the Code's definition of "debt" is broadly drafted, and that the legislative history, as well as the Code's various priority and dischargeability provisions, supports a broad reading of the definition. But nothing in the legislative history of these sections compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments.

sively.[13] If Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, "we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage," *TVA* v. *Hill*, 437 U. S. 153, 209 (1978) (POWELL, J., dissenting).

Our reading of § 523(a)(7) differs from that of the Second Circuit. On its face, it creates a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures. Congress included two qualifying phrases; the fines must be both "to and for the benefit of a governmental unit," and "not compensation for actual pecuniary loss." Section 523(a)(7) protects traditional criminal fines; it codifies the judicially created exception to discharge for fines. We must decide whether the result is altered by the two major differences between restitution and a traditional fine. Un-

[13] For the section-by-section analysis in the legislative Reports, see H. R. Rep. No. 95–595, p. 363 (1977); S. Rep. No. 95–989, p. 79 (1978). For explanations of the section by commentators, see 3 Collier on Bankruptcy ¶ 523.17 (15th ed. 1986); 1 W. Norton, Bankruptcy Law and Practice § 27.37 (1982). In fact, both of these commentators expressly state that the language does not have the intrusive effect sought by Robinson. See Collier ¶ 523.17, at 523–123, n. 4; Norton § 27.37, at 55, n. 2.

It seems likely that the limitation of § 523(a)(7) to fines assessed "for the benefit of a governmental unit" was intended to prevent application of that subsection to wholly private penalties such as punitive damages. See H. R. Doc. No. 93–137, pt. 2, pp. 116, 141 (1973). As for the reference to "compensation for actual pecuniary loss," the Senate Report indicates that the main purpose of this language was to prevent § 523(a)(7) from being applied to tax penalties. S. Rep. No. 95–989, *supra*, at 79.

We acknowledge that a few comments in the hearings and the Bankruptcy Laws Commission Report may suggest that the language bears the interpretation adopted by the Second Circuit. But none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements. See *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 493–494 (1931); 2A N. Singer, Sutherland on Statutory Construction § 48.10, pp. 319 and 321, n. 11 (4th ed. 1984).

like traditional fines, restitution is forwarded to the victim, and may be calculated by reference to the amount of harm the offender has caused.

In our view, neither of the qualifying clauses of § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. As the Bankruptcy Judge who decided this case noted in *Pellegrino:* "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." 42 B. R., at 133.

This point is well illustrated by the Connecticut statute under which the restitution obligation was imposed. The statute authorizes a judge to impose any of eight specified conditions of probation, as well as "any other conditions reasonably related to his rehabilitation." Conn. Gen. Stat. § 53a–30(a)(9) (1985). Clause (4) of that section authorizes a judge to require that the defendant

> "make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance."

This clause does not require imposition of restitution in the amount of the harm caused. Instead, it provides for a flexible remedy tailored to the defendant's situation.

Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate "for the benefit of" the State. Similarly, they are not assessed "for . . . compensation" of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State.[14] Those interests are sufficient to place restitution orders within the meaning of § 523(a)(7).

In light of the strong interests of the States, the uniform construction of the old Act over three-quarters of a century, and the absence of any significant evidence that Congress intended to change the law in this area, we believe this result best effectuates the will of Congress. Accordingly, the decision of the Court of Appeals for the Second Circuit is

Reversed.

JUSTICE MARSHALL, with whom JUSTICE STEVENS joins, dissenting.

Petitioners failed to assert timely objections to the discharge of respondent Robinson's restitution debt, and the

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[14] This is not the only context in which courts have been forced to evaluate the treatment of restitution orders by determining whether they are "compensatory" or "penal." Several lower courts have addressed the constitutionality of the federal Victim and Witness Protection Act, 18 U. S. C. § 3579. Under that Act, defendants have no right to jury trial as to the amount of restitution, even though the Seventh Amendment would require such a trial if the issue were decided in a civil case. See Note, The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982, 63 Texas L. Rev. 671 (1984). Every Federal Court of Appeals that has considered the question has concluded that criminal defendants contesting the assessment of restitution orders are not entitled to the protections of the Seventh Amendment. See *id.*, at 672, n. 18 (citing cases).

majority goes to considerable lengths to excuse this default. Respondent concedes that the restitution obligation would not have been discharged had petitioners objected in a timely fashion. Tr. of Oral Arg. 30.[1] When notified of respondent's bankruptcy proceeding, however, petitioners did nothing. They were told that they could file an objection to Robinson's discharge, but did not do so. Robinson's counsel informed the Connecticut Office of Adult Probation (Probation Office) of Robinson's discharge and of Robinson's belief that she need make no further payments, but the Probation Office did not respond. Not until almost three years after Robinson's discharge in bankruptcy did the Probation Office inform Robinson that it did not consider the debt discharged and that it intended to enforce the restitution order.

The Court charitably attributes petitioners' inaction to the fact that from the start petitioners took the position they assert here. *Ante*, at 39. But their representations at oral argument suggest only that they failed to object because "state agencies were admittedly somewhat confused on how to handle it," Tr. of Oral Arg. 9, and were "a little perplexed because this was the first time it happened." *Id.*, at 16. Petitioners seek a broad construction of the statute to excuse their confusion-induced waiver of the right to object and thereby guarantee that Robinson's restitution obligation would not be discharged. In my opinion, however, the statute cannot fairly be read to arrive at the result the majority reaches today.

The Court concludes that a criminal restitution obligation is nondischargeable under 11 U. S. C. § 523(a)(7) because it is

[1] Robinson's restitution debt would doubtless have come under 11 U. S. C. §§ 523(a)(2) or (4), which respectively provide that a discharge in bankruptcy will not affect a debt "for obtaining money . . . by . . . false pretenses, a false representation, or actual fraud," or a debt "for fraud or defalcation . . . , embezzlement, or larceny." To prevent discharge of such debts, however, the creditor must make a timely objection and the debtor must receive notice and a hearing. See 11 U. S. C. § 523(c); Bkrtcy. Rule 4007(c).

"a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . ." *Ibid.* I find unconvincing the majority's conclusion that the criminal restitution order at issue here is not "compensation for actual pecuniary loss."[2] While restitution imposed as a condition of probation under the Connecticut statute is in part a penal sanction, it is also intended to compensate victims for their injuries. The statute permits a court to require a defendant, as a condition of his probation, to "make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, *for the loss or damage caused thereby* . . . ." Conn. Gen. Stat. § 53a–30(a)(4) (1985) (emphasis added). Were the restitution order purely penal, the statute would not connect the amount of restitution to the damage imposed. Tying the amount of restitution to the amount of actual damage sustained by the victim strongly suggests that the payment is meant to compensate the victim. This comports with the theory underlying restitution sanctions. Restitution is not simply a punishment that incidentally compensates the victim. Indeed, compensation is an essential element of a restitution scheme, under which a wrong to the victim of a crime must be redressed not just by penalizing the offender but by restoring

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[2] Rather than argue solely that the restitution order fits precisely within the language of § 523(a)(7), the Court appears to rely in part on the fact that, prior to the enactment of the Bankruptcy Code, fines and penalties were rendered nondischargeable in bankruptcy under a judicially created exception to discharge. The majority contends that "Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences," *ante*, at 46, and that Congress should not be deemed to abrogate judicially created law unless it makes explicit the intent to do so. But, far from abrogating judicially created law making fines and penalties nondischargeable as a general matter, Congress has codified that law *and* added the requirements of § 523(a)(7). The historical basis of the exception does not negate the additional limitations expressed in the statute.

the victim, as far as possible, to "the position that [he] would have been in if the original criminal act had never occurred." R. Barnett & J. Hagel, Assessing the Criminal: Restitution, Retribution, and the Legal Process, in Assessing the Criminal: Restitution, Retribution, and the Legal Process 1, 27 (1977); see also *id.*, at 25–28. That the victim has no control over whether restitution will be imposed or in what sum does not mean that the restitution is not compensation for actual pecuniary loss.[3]

Nor do I accept that we can avoid the consequences of respondent's discharge in bankruptcy by finding that the restitution obligation was not a "debt." First, the scope of debts under the Code is expansive. "Debt" is defined in 11 U. S. C. § 101(11) as "liability on a claim," and "claim" is defined in § 101(4) as a "right to payment." The legislative history of the Code indicates that "claim" was to be given the "broadest possible definition." H. R. Rep. No. 95–595, p. 309 (1977); S. Rep. No. 95–989, p. 22 (1978); see also *Ohio* v. *Kovacs*, 469 U. S. 274, 279 (1985) ("[I]t is apparent that Congress desired a broad definition of a 'claim' "). In light of the broad scope of "debt" under the Code, I agree with the

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[3] The other qualification in § 523(a)(7), that the fine, penalty, or forfeiture must be "payable to and for the benefit of a governmental unit," is not a consideration here because the restitution order in this case meets this requirement. It does so, however, only because the victim of Robinson's larceny was a government agency. Where the victim is a private individual, it could not legitimately be said that restitution payments destined for that individual are made "for the benefit of a governmental unit." Restitution intended to repay a private victim for the damage done to him is only "for the benefit of a governmental unit" in the sense that the State, which comes within the definition of "governmental unit," see 11 U. S. C. § 101(21), is benefited every time justice is served. The Court appears to take this approach, stating: "The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole." *Ante*, at 52. If the requirement is to be read so broadly, however, *any* fine, penalty, or forfeiture would be for the benefit of a governmental unit, making this qualification in § 523(a)(7) superfluous.

Court of Appeals that the Probation Office had a right to payment, notwithstanding "that the right is enforceable by the threat of revocation of probation and incarceration rather than by the threat of levy and execution on the debtor's property. The right is not the less cognizable because the obligor must suffer loss of freedom rather than loss of property upon failure to pay." *In re Robinson*, 776 F. 2d 30, 38 (CA2 1985).[4]

The definition of "debt" is intentionally broad not only to ensure the debtor a meaningful discharge but also to guarantee as many creditors as possible the right to participate in the distribution of the property of the estate. See H. R. Rep. No. 95–595, *supra*, at 180:

> "[U]nder the liquidation chapters of the [1898] Bankruptcy Act, certain creditors are not permitted to share in the estate because of the non-provable nature of their claims, and the debtor is not discharged from those claims. Thus, relief for the debtor is incomplete, and those creditors are not given an opportunity to collect in the case on their claims. The proposed law will permit a complete settlement of the affairs of a bankrupt debtor,

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[4] Though Connecticut does not permit the victim to enforce the restitution order as a civil judgment, other jurisdictions do. See, *e. g.*, 18 U. S. C. § 3579(h) (any order of restitution imposed by a federal court "may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action"); Ga. Code Ann. § 17–14–13(a) (1982) ("A restitution order shall be enforceable as is a civil judgment by execution"). Under such statutes, it would be even more difficult to argue that a criminal restitution order does not create a "right to payment" and is consequently not a "debt." Compare *In re Pellegrino*, 42 B. R. 129, 132 (Bkrtcy. Ct. Conn. 1984) ("Since a crime victim has no 'right to payment,' restitution is not a 'debt' under Bankruptcy Code § 101(11)"), with *In re Newton*, 15 B. R. 708, 710 (Bkrtcy. Ct. ND Ga. 1981) (holding that, since Georgia law provided for enforcement of restitution orders by the victim, "in Georgia, an order of restitution is a debt").

and a complete discharge and fresh start" (footnote omitted).

As the Court of Appeals observed, a conclusion that the restitution obligation was not a debt "would produce the anomalous result that no holder of a right to restitution could participate in the bankruptcy proceeding or receive any distributions of the debtor's assets in liquidation. There is no evidence that Congress intended such a result." *In re Robinson*, 776 F. 2d, at 35–36. On the contrary, Congress plainly intended that fines, penalties, and forfeitures be deemed debts eligible to participate in the distribution of the bankruptcy estate, and the statute provides explicitly for that participation. See 11 U. S. C. § 726(a)(4).[5] The very fact that fines, penalties, and forfeitures are made nondischargeable under § 523(a)(7) indicates that they were deemed "debts"; if they were not debts, they would not be affected by discharge, see 11 U. S. C. § 524, and there would be no need to make them nondischargeable.

While I am wholly in sympathy with the policy interests underlying the Court's opinion, "in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches." *TVA* v. *Hill*, 437 U. S. 153, 195 (1978). Congress might have amended the Code to achieve the result reached here had it confronted the question, but "[i]t is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *Id.*, at 185. I would affirm the judgment and permit Congress, if it were so inclined, to

[5] The estate is distributed in payment of "claims," see 11 U. S. C. § 726. The legislative history makes clear that the terms "debt" and "claim" "are coextensive: a creditor has a 'claim' against the debtor; the debtor owes a 'debt' to the creditor." H. R. Rep. No. 95–595, p. 310 (1977).

amend the Bankruptcy Code specifically to make criminal restitution obligations nondischargeable in bankruptcy.[6] I respectfully dissent.

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[6]The Court's solution only postpones the problem: its holding that the restitution obligation is nondischargeable under § 523(a)(7) leaves open the possibility that such obligations will be dischargeable under Chapter 13. See 11 U. S. C. § 1328(a), 3 W. Norton, Bankruptcy Law and Practice § 78.01 (1981); 5 Collier on Bankruptcy ¶ 1328.01[1][c] (15th ed. 1986) (broader discharge intended as incentive for debtors to complete performance under Chapter 13 plans); but see *In re Newton*, *supra*, at 710 (holding restitution order nondischargeable under § 1328). The Court's opinion therefore does not lay to rest the difficulties the courts will have in coordinating the Bankruptcy Code with state criminal restitution statutes.

ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85–495. Argued October 14, 1986—Decided November 17, 1986

Respondent Philbrook (hereafter respondent), a teacher employed by petitioner school board (Board), is a member of a church whose tenets require members to refrain from secular employment during designated holy days, a practice that has caused respondent to miss approximately six schooldays each year. Under pertinent collective-bargaining agreements between the Board and the teachers' union, teachers were granted three days' annual leave for observance of religious holidays, but could not use for religious observance any accumulated sick leave, three days of which were otherwise available for "necessary personal business." Pursuant to the collective-bargaining agreements, respondent used the three days granted for religious holidays each year, and then either took unauthorized unpaid leave, scheduled required hospital visits on church holy days, or worked on those days. Respondent repeatedly asked the Board either to adopt the policy of allowing use of the three days of personal business leave for religious observance or, in the alternative, to allow him to pay the cost of a substitute and receive full pay for additional days off for religious observances. The Board consistently rejected both proposals, and respondent ultimately filed suit in Federal District Court, alleging that the Board had violated the prohibition against religious discrimination under Title VII of the Civil Rights Act of 1964, particularly the Board's obligation under § 701(j) of the Act to "reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." After trial, the District Court concluded that respondent had failed to prove a case of religious discrimination because he had not been placed by the Board in a position of violating his religion or losing his job. The Court of Appeals reversed and remanded, holding that respondent had established a prima facie case of discrimination. The court then assumed that the Board's leave policy constituted a reasonable accommodation to respondent's belief, but held that where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the employee's proposal unless that accommodation causes undue hardship on the conduct of the employer's business.

The case was remanded for consideration of the hardship that would result from respondent's suggestions.

Held:

1. This case presents no issue that requires, for purposes of Title VII religious accommodation claims, the establishing of a proof scheme delineating a plaintiff's prima facie case and the shifting production burdens. The ultimate Title VII question of discrimination *vel non* was directly before the District Court because the Board failed to persuade the court to dismiss the action for want of a prima facie case, and the case was fully tried on the merits. Thus, the issue whether respondent made out a prima facie case was no longer relevant. Cf. *United States Postal Service Board of Governors* v. *Aikens*, 460 U. S. 711. Pp. 67–68.

2. Neither the terms nor the legislative history of § 701(j) supports the Court of Appeals' conclusion that an employer's accommodation obligation includes a duty to accept the employee's proposal unless that accommodation causes undue hardship on the conduct of the employer's business. An employer has met its obligation under § 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship. The extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship. Pp. 68–69.

3. Because both of the courts below applied an erroneous view of the law, neither explicitly considered the question whether the Board's leave policy constituted a reasonable accommodation of respondent's religious beliefs. There are insufficient factual findings as to the manner in which the collective-bargaining agreements have been interpreted in order for this Court to make that judgment initially. On remand the District Court should make the necessary findings as to past and existing practice in the administration of the collective-bargaining agreements. Pp. 70–71.

757 F. 2d 476, affirmed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., *post*, p. 71, and STEVENS, J., *post*, p. 75, filed opinions concurring in part and dissenting in part.

Thomas N. Sullivan argued the cause for petitioners. With him on the briefs was *Robert J. Murphy*. *Robert F. McWeeny* argued the cause and filed a brief for Ansonia Fed-

eration of Teachers, respondent under this Court's Rule 19.6, in support of petitioners.

David N. Rosen argued the cause for respondent Philbrook. With him on the brief was *Paul Gewirtz.*

Solicitor General Fried argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Assistant Attorneys General Reynolds* and *Willard, Deputy Solicitor General Carolyn B. Kuhl, Deputy Assistant Attorney General Carvin, Richard J. Lazarus, Brian K. Landsberg, Louise A. Lerner,* and *Johnny J. Butler.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Ansonia Board of Education has employed respondent Ronald Philbrook since 1962 to teach high school business and typing classes in Ansonia, Connecticut. In 1968, Philbrook was baptized into the Worldwide Church of God. The tenets of the church require members to refrain from secular employment during designated holy days, a

*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Michael H. Gottesman, David M. Silberman,* and *Laurence Gold;* and for the Equal Employment Advisory Council et al. by *Robert E. Williams, Douglas S. McDowell, William S. Franklin, August W. Steinhilber, Gwendolyn H. Gregory,* and *Thomas A. Shannon.*

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut by *Joseph I. Lieberman,* Attorney General, *Clarine Nardi Riddle,* Deputy Attorney General, *Henry S. Cohn* and *Robert B. Teitelman,* Assistant Attorneys General, and *Philip A. Murphy, Jr.;* for the American Jewish Congress et al. by *Marc D. Stern* and *Ronald A. Krauss;* for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Council on Religious Freedom by *Lee Boothby, James M. Parker,* and *Robert W. Nixon;* for the General Conference of Seventh-day Adventists by *Walter E. Carson;* for the Presbyterian Church (USA) et al. by *Douglas Laycock, Samuel E. Ericsson, Michael J. Woodruff,* and *Kimberlee Wood Colby;* and for the Rutherford Institute et al. by *W. Charles Bundren, Guy O. Farley, Jr., Larry L. Crain, Thomas O. Kotouc, Alfred Lindh, William B. Hollberg,* and *Wendell R. Bird.*

practice that has caused respondent to miss approximately six schooldays each year. We are asked to determine whether the employer's efforts to adjust respondent's work schedule in light of his belief fulfill its obligation under § 701 (j) of the Civil Rights Act of 1964, 86 Stat. 103, 42 U. S. C. § 2000e(j), to "reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[1]

Since the 1967–1968 school year, the school board's collective-bargaining agreements with the Ansonia Federation of Teachers have granted to each teacher 18 days of leave per year for illness, cumulative to 150 and later to 180 days. Accumulated leave may be used for purposes other than illness as specified in the agreement. A teacher may accordingly use five days' leave for a death in the immediate family, one day for attendance at a wedding, three days per year for attendance as an official delegate to a national veterans organization, and the like. See, *e. g.*, App. 98–99. With the exception of the agreement covering the 1967–1968 school year, each contract has specifically provided three

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[1] The reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion. Title VII's central provisions make it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ," § 703(a)(1), 42 U. S. C. § 2000e–2(a)(1), or "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion . . . ." § 703(a)(2), 42 U. S. C. § 2000e–2(a)(2). Section 701(j), 42 U. S. C. § 2000e(j), was added in 1972 to illuminate the meaning of religious discrimination under the statute. It provides that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

days' annual leave for observance of mandatory religious holidays, as defined in the contract. Unlike other categories for which leave is permitted, absences for religious holidays are not charged against the teacher's annual or accumulated leave.

The school board has also agreed that teachers may use up to three days of accumulated leave each school year for "necessary personal business." Recent contracts limited permissible personal leave to those uses not otherwise specified in the contract. This limitation dictated, for example, that an employee who wanted more than three leave days to attend the convention of a national veterans organization could not use personal leave to gain extra days for that purpose. Likewise, an employee already absent three days for mandatory religious observances could not later use personal leave for "[a]ny religious activity," *id.*, at 80, 83, 86, 89, 92, or "[a]ny religious observance." *Id.*, at 96, 100. Since the 1978–1979 school year, teachers have been allowed to take one of the three personal days without prior approval; use of the remaining two days requires advance approval by the school principal.

The limitations on the use of personal business leave spawned this litigation. Until the 1976–1977 year, Philbrook observed mandatory holy days by using the three days granted in the contract and then taking unauthorized leave. His pay was reduced accordingly.[2] In 1976, however, respondent stopped taking unauthorized leave for religious reasons, and began scheduling required hospital visits on church holy days. He also worked on several holy days. Dissatisfied with this arrangement, Philbrook repeatedly asked the school board to adopt one of two alternatives. His preferred alternative would allow use of personal business leave for religious observance, effectively giving him three addi-

[2] Absence for reasons not contemplated by the contract resulted in a proportionate deduction from pay; since 1971, 1/180 of annual salary had been deducted for each day of unexcused absence. App. 84, 90, 93, 97, 101.

tional days of paid leave for that purpose. Short of this arrangement, respondent suggested that he pay the cost of a substitute and receive full pay for additional days off for religious observances.[3] Petitioner has consistently rejected both proposals.

In 1973 Philbrook filed a complaint with the Connecticut Commission on Human Rights and Opportunities and the Equal Employment Opportunity Commission against the school board and the Ansonia Federation of Teachers. After exhausting the available administrative avenues, he filed a complaint in the United States District Court for the District of Connecticut, alleging that the prohibition on the use of "necessary personal business" leave for religious observance violated §§ 703(a)(1), (2) of Title VII, 42 U. S. C. §§ 2000e–2(a)(1), (2), and seeking both damages and injunctive relief.[4]

After a 2-day trial, the District Court concluded that Philbrook had failed to prove a case of religious discrimination because he had not been placed by the school board in a position of violating his religion or losing his job.

The Court of Appeals for the Second Circuit reversed and remanded for further proceedings. It held that a prima facie case of discrimination is established when an employee shows that

> "'(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting em-

[3] The suggested accommodation would reduce the financial costs to Philbrook of unauthorized absences. In 1984, for example, a substitute cost $30 per day, and respondent's loss in pay from an unauthorized absence was over $130.

[4] Philbrook's complaint also alleged that petitioner Board's policies and practices violated his free exercise rights under the First Amendment. Because the Court of Appeals remanded the Title VII claim for further proceedings, it did not address Philbrook's First Amendment claims, and we have no occasion to consider them here.

ployment requirement.' " 757 F. 2d 476, 481 (1985), quoting *Turpen* v. *Missouri-Kansas-Texas R. Co.*, 736 F. 2d 1022, 1026 (CA5 1984).

Philbrook established his case, the court held, by showing that he had a sincere religious belief that conflicted with the employer's attendance requirements, that the employer was aware of the belief, and that he suffered a detriment—namely, a loss of pay—from the conflict.[5] The court then assumed that the employer's leave policy constituted a reasonable accommodation to Philbrook's belief. It held, however, that "[w]here the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business." 757 F. 2d, at 484. The Court of Appeals remanded for consideration of the hardship that would result from Philbrook's suggestions.

We granted certiorari to consider the important questions of federal law presented by the decision of the Court of Appeals. 474 U. S. 1080 (1986). Specifically, we are asked to address whether the Court of Appeals erred in finding that Philbrook established a prima facie case of religious discrimination and in opining that an employer must accept the employee's preferred accommodation absent proof of undue hardship. We find little support in the statute for the approach adopted by the Court of Appeals, but we agree that the ultimate issue of reasonable accommodation cannot be resolved without further factual inquiry. We accordingly affirm the judgment of the Court of Appeals remanding the case to the District Court for additional findings.

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[5] Judge Pollack, Senior District Judge of the Southern District of New York sitting by designation, dissented. He agreed with the District Court that "[t]he School Board's policy neither deprives the plaintiff of employment opportunities nor adversely affects his employment status." 757 F. 2d, at 489. Accordingly, he found that the policy did not "'discriminate' within Title VII's use and meaning of that term . . . ." *Ibid.*

As we noted in our only previous consideration of § 701(j), its language was added to the 1972 amendments on the floor of the Senate with little discussion. *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 74, n. 9 (1977). See 118 Cong. Rec. 705–706 (1972). In *Hardison*, *supra*, at 84, we determined that an accommodation causes "undue hardship" whenever that accommodation results in "more than a *de minimis* cost" to the employer. Hardison had been discharged because his religious beliefs would not allow him to work on Saturdays and claimed that this action violated the employer's duty to effect a reasonable accommodation of his beliefs. Because we concluded that each of the suggested accommodations would impose on the employer an undue hardship, we had no occasion to consider the bounds of a prima facie case in the religious accommodation context or whether an employer is required to choose from available accommodations the alternative preferred by the employee. The employer in *Hardison* simply argued that all conceivable accommodations would result in undue hardship, and we agreed.

Petitioner asks us to establish for religious accommodation claims a proof scheme analogous to that developed in other Title VII contexts, delineating the plaintiff's prima facie case and shifting production burdens. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). But the present case raises no such issue. As in *United States Postal Service Board of Governors* v. *Aikens*, 460 U. S. 711 (1983), the defendant here failed to persuade the District Court to dismiss the action for want of a prima facie case, and the case was fully tried on the merits. We held in *Aikens* that these circumstances place the ultimate Title VII question of discrimination *vel non* directly before the court. "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer rele-

vant." *Id.*, at 715. We may therefore proceed to the question whether the employer's proposed accommodation of respondent's religious practices comports with the statutory mandate of § 701(j).

In addressing this question, the Court of Appeals assumed that the employer had offered a reasonable accommodation of Philbrook's religious beliefs. This alone, however, was insufficient in that court's view to allow resolution of the dispute. The court observed that the duty to accommodate "cannot be defined without reference to undue hardship." 757 F. 2d, at 484. It accordingly determined that the accommodation obligation includes a duty to accept "the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business." *Ibid.* Cf. *American Postal Workers Union* v. *Postmaster General*, 781 F. 2d 772, 776 (CA9 1986) (Title VII does not dictate that "an employer must accept any accommodation, short of 'undue hardship,' proposed by an employee . . ."). Because the District Court had not considered whether Philbrook's proposals would impose undue hardship, the Court of Appeals remanded for further consideration of those proposals.

We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. The employer violates the statute unless it "demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U. S. C. § 2000e(j). Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship. As *Hardison* illustrates, the extent of

undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship. Once the Court of Appeals assumed that the school board had offered to Philbrook a reasonable alternative, it erred by requiring the Board to nonetheless demonstrate the hardship of Philbrook's alternatives.

The legislative history of § 701(j), as we noted in *Hardison*, *supra*, at 74–75, and n. 9, is of little help in defining the employer's accommodation obligation. To the extent it provides any indication of congressional intent, however, we think that the history supports our conclusion. Senator Randolph, the sponsor of the amendment that became § 701(j), expressed his hope that accommodation would be made with "flexibility" and "a desire to achieve an adjustment." 118 Cong. Rec. 706 (1972). Consistent with these goals, courts have noted that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Brener* v. *Diagnostic Center Hospital*, 671 F. 2d 141, 145–146 (CA5 1982). See also *American Postal Workers*, *supra*, at 777. Under the approach articulated by the Court of Appeals, however, the employee is given every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict. This approach, we think, conflicts with both the language of the statute and the views that led to its enactment. We accordingly hold that an employer has met its obligation under § 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee.[6]

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[6]The Court of Appeals found support for its decision in the EEOC's guidelines on religious discrimination. 757 F. 2d, at 485, and n. 7. Specifically, the guidelines provide that "when there is more than one means of accommodation which would not cause undue hardship, the employer . . . must offer the alternative which least disadvantages the individual with re-

The remaining issue in the case is whether the school board's leave policy constitutes a reasonable accommodation of Philbrook's religious beliefs. Because both the District Court and the Court of Appeals applied what we hold to be an erroneous view of the law, neither explicitly considered this question. We think that there are insufficient factual findings as to the manner in which the collective-bargaining agreements have been interpreted in order for us to make that judgment initially. We think that the school board policy in this case, requiring respondent to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one. In enacting § 701(j), Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices, but it did not impose a duty on the employer to accommodate at all costs. *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977). The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work. Generally speaking, "[t]he direct effect of [unpaid leave] is merely a loss of income for the period

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spect to his or her employment opportunities." 29 CFR § 1605.2(c)(2)(ii) (1986). Though superficially consistent with the burden imposed by the Court of Appeals, this guideline, by requiring the employer to choose the option that least disadvantages an individual's *employment opportunities*, contains a significant limitation not found in the court's standard. To the extent that the guideline, like the approach of the Court of Appeals, requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute. We have, of course, noted that EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law. *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 141 (1976); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140 (1944). See also *Trans World Airlines, Inc.* v. *Hardison* 432 U. S. 63, 76, n. 11. (1977).

the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status." *Nashville Gas Co.* v. *Satty*, 434 U. S. 136, 145 (1977).

But unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones. A provision for paid leave "that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all." *Hishon* v. *King & Spalding*, 467 U. S. 69, 75 (1984). Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness. Whether the policy here violates this teaching turns on factual inquiry into past and present administration of the personal business leave provisions of the collective-bargaining agreement. The school board contends that the necessary personal business category in the agreement, like other leave provisions, defines a limited purpose leave. Philbrook, on the other hand, asserts that the necessary personal leave category is not so limited, operating as an open-ended leave provision that may be used for a wide range of secular purposes in addition to those specifically provided for in the contract, but not for similar religious purposes. We do not think that the record is sufficiently clear on this point for us to make the necessary factual findings, and we therefore affirm the judgment of the Court of Appeals remanding the case to the District Court. The latter court on remand should make the necessary findings as to past and existing practice in the administration of the collective-bargaining agreements.

It is so ordered.

JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree with the Court's conclusion that, if the school board provides paid leave "for all purposes *except* religious ones," *ante* this page, its accommodation of Philbrook's religious needs would be unreasonable and thus violate Title VII.

But I do not find the specificity of the personal business leave, or the possibility that it may be used for activities similar to the religious activities Philbrook seeks leave to pursue, necessarily dispositive of whether the Board has satisfied its affirmative duty under § 701(j), 42 U. S. C. § 2000e(j), to reasonably accommodate Philbrook's religious needs. Even if the District Court should find that the personal leave is restricted to specific secular uses having no similarity with Philbrook's religious activities, Philbrook would still encounter a conflict between his religious needs and work requirements. In my view, the question would remain whether, without imposing an undue hardship on the conduct of its educational program, the school board could further reasonably accommodate Philbrook's need for additional religious leave.

If, for example, the personal business leave were so limited that it allowed teachers paid leave for the sole purpose of meeting with their accountants to prepare their income tax returns (a purely secular activity), a proposal from Philbrook that he be allowed to prepare his tax return on his own time and use this paid leave for religious observance might be found imminently reasonable and lacking in undue hardship. The Board's prior determination that the conduct of its educational program can withstand the paid absence of its teachers for up to six days each year for religious and personal reasons tends to indicate that granting Philbrook's similar request in this case for a total of six days paid religious leave and no personal leave is reasonable, would cause the Board no undue hardship, and hence falls within the scope of the Board's affirmative obligation under Title VII.

The Court suggests that requiring an employer to consider an employee's proposals would enable the employee to hold his employer hostage in exchange for a particular accommodation. *Ante*, at 69. If the employer has offered a reasonable accommodation that *fully* resolves the conflict between the employee's work and religious requirements, I agree that

no further consideration of the employee's proposals would normally be warranted. But if the accommodation offered by the employer does not completely resolve the employee's conflict, I would hold that the employer remains under an obligation to consider whatever *reasonable* proposals the employee may submit.

I do not accept the Court's conclusion that the statute, "[b]y its very terms," relieves the Board from this continuing duty to accommodate the special religious practices of its employees where doing so is reasonable and causes no undue hardship. *Ante*, at 68. The statute simply creates an affirmative duty to accommodate; it does not specify who must respond to whom. Nor am I persuaded that the legislative history cited by the Court disposes of this issue. The statement of Senator Randolph, who sponsored the amendment, that he hoped the "accommodation would be made with 'flexibility' and 'a desire to achieve an adjustment,'" lends at least as much support to the concept of the employer's continuing duty as it does to the Court's reading of the statute. *Ante*, at 69 (quoting 118 Cong. Rec. 706 (1972)).

The EEOC's guidelines on religious discrimination support an interpretation of the statute placing this continuing duty to accommodate on the employer.* Just last Term, in

*EEOC Guideline § 1605.2(c) states:

"(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

"(i) The alternatives for accommodation considered by the employer or labor organization; and

"(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities." 29 CFR § 1605.2(c) (1986).

Meritor Savings Bank v. *Vinson*, 477 U. S. 57, 65 (1986), we expressly relied on an EEOC guideline in holding that sexual harassment charges could provide the basis for a Title VII claim. The Court's reluctance to accord similar weight to the EEOC's interpretation here rests on nothing more than a selective reading of the express provisions of Title VII and the guidelines. *Ante*, at 69–70, n. 6. Title VII prohibits discrimination not only with respect to *employment opportunities*, § 703(a)(2), 42 U. S. C. § 2000e–2(a)(2), but also with respect to "*compensation*, terms, conditions, or privileges of employment." § 703(a)(1), 42 U. S. C. § 2000e–2(a)(1) (emphasis added). The EEOC guidelines consider compensation encompassed within the concept of "employment opportunities." 29 CFR § 1605.2(c) (1986). A forced reduction in compensation based on an employee's religious beliefs can be as much a violation of Title VII as a refusal to hire or grant a promotion.

In this case, contrary to the Court's conclusion, *ante*, at 70–71, the school board's accommodation of Philbrook's religious needs by merely allowing unpaid leave does not eliminate the conflict. Rather, the offer forces Philbrook to choose between following his religious precepts with a partial forfeiture of salary and violating these precepts for work with full pay. It is precisely this loss of compensation that entitles Philbrook to further accommodation, if reasonably possible without undue hardship to the school board's educational program. It may be that unpaid leave will generally amount to *a* reasonable accommodation, but this does not mean that unpaid leave will always be *the* reasonable accommodation which *best* resolves the conflict between the needs of the employer and employee. In my view, then, an offer of unpaid leave does not end the inquiry: If an employee, in turn, offers another reasonable proposal that results in a more effective resolution without causing undue hardship, the employer should be required to implement it.

The Court's analysis in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977), is difficult to reconcile with its holding today. In *Hardison*, the Court held that the employer's chosen work schedule was a reasonable accommodation but nonetheless went on to consider and reject each of the alternative suggested accommodations. The course followed in *Hardison* should have been adopted here as well. "Once it is determined that the duty to accommodate sometimes requires that an employee be exempted from an otherwise valid work requirement, the only remaining question is . . . : Did [the employer] prove that *it exhausted all reasonable accommodations*, and that the *only remaining alternatives would have caused undue hardship* on [the employer's] business?" *Id.*, at 91 (MARSHALL, J., dissenting) (emphasis added).

Accordingly, I would remand this case for factual findings on both the intended scope of the school board's leave provision *and* the reasonableness and expected hardship of Philbrook's proposals.

JUSTICE STEVENS, concurring in part and dissenting in part.

While I agree with the Court's rejection of the rationale of the Court of Appeals' opinion, I would simply reverse its judgment. Remanding for further proceedings in the District Court is both unnecessary and confusing. Whether respondent Philbrook's complaint is analyzed as an outright claim that he is entitled to six paid days of leave for religious observance or as an argument that petitioner's employment policies, while facially neutral, fail to accommodate his religious beliefs, the record before us plainly discloses that he cannot prevail.

I

The school board has a clear duty not to discriminate against Philbrook because of his religious faith. Section 703(a) of the Civil Rights Act of 1964 flatly prohibits an em-

ployer from discriminating against any individual by basing employment and workplace decisions on the employee's or prospective employee's religion. This stricture against disparate treatment based on religion is simultaneously extended and qualified by § 701, which defines religion for purposes of the Act. Congress defines religion to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." § 701(j). The statute therefore imposes a duty on the employer to make reasonable accommodations, short of undue hardship, for the religious practices of his employees. *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 74 (1977). The effect of § 703(a) is to impose a special duty upon the employer when—and only when—a conflict arises between an individual's religious observance or practice and the employer's policy.

The statute does not allow a plaintiff raising a claim under § 701(j) to charge immediately onto the field of undue hardship. Folded within § 701(j) are certain preliminary inquiries. First, the court must ask whether the employee's job obligations are in conflict with his religious obligations. "The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee." *Hardison, supra*, at 87 (MARSHALL, J., dissenting). Absent a conflict, it makes no sense to speak of a duty to accommodate; there is no competing claim on the employee for which the employer must make adjustments. If the duty does arise, the statute requires the employer to resolve the conflict if it can do so without undue hardship. As the Court correctly holds, the employer has no statutory duty to resolve the conflict in the way the employee requests as long as the solution that is adopted is reasonable. I find it equally clear that the em-

ployer has no statutory duty to do anything more than strictly necessary to resolve the conflict.

Because the existence and scope of the duty to accommodate depend solely on the nature of the conflict between the terms of the job and the requirements of the religion, it is essential to identify the alleged conflict as precisely as possible. In this case Philbrook's faith prevents him from working on certain schooldays. The school board does not require him to work on any of those days; on three of those days each year it pays him even though he does not work, and on the other days it declines to pay him for the time that he spends discharging his religious obligations. The existence of a conflict is thus not immediately apparent.

Philbrook argues, however, that the contractual arrangement occasions two conflicts between his religious requirements and his employer's job requirements. First, he argues that the employer's practice of excluding religious observance as a permissible use of the three days of paid annual leave for "necessary personal business" is directly in conflict with his religious practice, because he needs to take those days as days of religious obligation. Second, during his unpaid absence from work on days of religious obligation, he is unable to do work and must later—or earlier—perform this work without separate compensation. In essence, he argues that the employer's practice of requiring him to complete this work, which is an integral part of his job duties as a salaried employee, conflicts with his religious obligation to be absent on the days when he would otherwise have performed this work and been paid for it. An examination of these claims discloses that neither has merit.

II

Philbrook has contended that the school board has discriminated on the basis of religion in the allocation of its paid annual leave, or more specifically, in the limitation it has placed on the use of three days of paid annual leave for neces-

sary personal business. Properly viewed, the conflict Philbrook alleges is one which is not cognizable under § 703 and therefore entitles him to no relief. He points to the conflict, by no means specific to the practice of religion, between the Board's leave policy and the needs of an employee who wishes to use the three days of necessary personal business leave for any purpose not allowed by the contract. The Board allows all of its teachers three days of paid annual leave for "necessary personal business" but prohibits them from using any of those days for "[a]ny religious activity." On its face, this prohibition might appear to discriminate against employees who need to take a day off to attend church in favor of those who need a day off for secular reasons. The argument fails, however, because it does not fully describe either the scope of the separate provision for paid leave for religious purposes or the restricted scope of the provision for leave for necessary personal business.

The collective-bargaining agreement between the school board and the teachers' union contains generous provisions for paid leave for various specific purposes. After stating that 18 days of annual leave shall be granted "for personal illness and/or illness in the immediate family," the contract specifies 11 additional categories of personal leave, including 5 days for a death in the immediate family, 1 day each for attendance at funerals, weddings, graduations, and immediate family religious services, and 3 days each for "[m]andated religious observances" and "[n]ecessary personal business." The teacher is not required to identify the specific character of his personal business, but the contract limits the teacher's discretion by stating:

> "Necessary personal business shall not include (without limitations):
>
> "1. Marriage attendance or participation;
>
> "2. Day following marriage or wedding trip;
>
> "3. Attendance or participation in a sporting or recreational event;

"4. Any religious observance;
"5. Travel associated with any provision of annual leave;
"6. Purposes set forth under annual leave or another leave provision of this contract." App. 100.

Philbrook does not contend that the leave policy is discriminatory because he is eligible for, or has actually received, fewer days of paid leave than members of other religious faiths or than teachers who have no religious obligations on schooldays. The basis of his principal discrimination argument is that the total of six days for mandated religious observances and necessary personal business is not adequate to enable him to take care of "the personal business that is most important and pressing to him: religious activity and observance,"[1] whereas this combination of six days of paid leave is adequate for some teachers who have different religious and ethical commitments. Quite clearly, however, this argument rests on the premise that Philbrook's special, that is, religious, needs entitle him to extraordinary treatment. His "discrimination" argument states a grievance against equal treatment rather than a claim that he has been the recipient of unequal treatment.[2]

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[1] "On the other hand, after Philbrook uses up his three days for religious leave, Ansonia's personal leave policy does not allow him to use the remaining three days of personal leave for the personal business that is most important and pressing to him: religious activity and observance. Unlike the Jewish teacher, Philbrook is a member of a faith that requires more than three days away from work for religious observance. *His* important and necessary personal business, involving fulfilling his need to gain understanding of the world around him, to serve the highest interests of his community, and to provide guidance and stability for his family, are all served by performing his religious obligation and attending his church. Solely because these needs are fulfilled for him through religious observance rather than secular activity, he is prohibited from using his personal leave to meet them." Brief for Respondent Philbrook 16.

[2] Denying the use of personal business days for religious purposes is no more discriminatory against religion than if the personal business leave category were entirely absent from the contract. Neither a decision to refuse personal business leave days altogether nor a decision to provide

This point comes into sharp focus when the contractual prohibition against using the three days of personal leave for "any religious observance" is seen for what it is, merely a part of the broader prohibition against using personal business leave for any of the purposes specifically authorized in the contract. The existing leave policy denies paid days to any teacher who proposes to take more paid days of personal business leave per year to fulfill his or her commitments than the contract allows. Philbrook's wish to use his secular leave for religious purposes is thwarted by the same policy that denies an avid official delegate to a national veterans' organization use of secular leave days for that activity in excess of the days specifically allotted for it under the contract. In fact, since three days are expressly authorized for mandated religious observances—events that recur each year—whereas most other categories of paid leave cover relatively infrequent contingencies such as a death in the family or attendance at a family wedding, it is highly probable that the leave policy as a whole tends to favor, rather than to disfavor, persons who must observe religious days during the school year. For example, an atheist who attends a wedding, a funeral, and a graduation on schooldays receives a total of three days of paid personal leave, but a religious person who attends the same three events on paid days also receives pay for three religious days.

III

Philbrook's second claim is that the board has a duty of reasonable accommodation "to mitigate the burden of the Board's requirement that [he] work without pay in connection with his absence for religious observance." Brief for

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these days for specific purposes not otherwise provided for in the contract represents a discrimination against religion.

Respondent Philbrook 24.[3] This claim founders because it discloses no conflict between Philbrook's religion and his employment. If he had been disciplined, or discharged, for taking too many days off for religious services, the result would be different, but the only inconvenience to which he is subjected is the necessity of doing work on paid days that he was unable to do during his days of religious observance. This inconvenience arises not because of any discrimination against religion, but because the employee's missed day of work is unpaid. Every employee who takes a day off from work for an unauthorized purpose suffers the same inconvenience as Philbrook; each loses a day of pay and must make up the work associated with that day. The obligation to perform the work carries over, not because the employee has exercised his religion in the one case or satisfied a secular business need in another, but for the generic and shared reason that the employee was not paid for a day on which he was hired to do work. Since no statutory conflict between Philbrook's religion and his work duties occurred, the duty to accommodate his religious practices never arose.

IV

The present state of the record enables me to conclude that Philbrook states no claim of religious discrimination under § 703(a). In remanding the case, the Court apparently overlooks the plain fact that its rejection of the Court of Appeals' view of the duty of reasonable accommodation eliminates the necessity for further factual findings. Under the Court of

[3] As he explains:

"His job has at least three parts: For every class he must first prepare the lesson plan; then teach the class; and finally review his students' classwork. On the days he is absent for religious holy days, he prepares the lesson plans for his classes and reviews them with his substitute. He then receives and corrects the assignments his students have completed in his absence. [App. 68–70.] Although his pay is docked, he is still required to perform a substantial fraction of the duties for which his pay was intended to compensate him." *Id.*, at 24–25.

Appeals' theory that the employer has a duty to accept any reasonable accommodation proposal made by the employee as long as it does not result in "undue hardship," a remand to the District Court was appropriate to resolve the "undue hardship" issue. I do not understand why a remand is appropriate now. The Court of Appeals has already concluded that if no analysis of undue hardship is required, the Board's policy of granting three days of paid leave and additional days of unpaid leave for religious observances complies with the statute.[4] Neither that court nor the District Court saw any reason to make a special analysis of the "past and present administration of the personal business leave provisions of the collective-bargaining agreement." *Ante*, at 71.

In view of the record, the factual analysis the Court calls for may satisfy the demands of the Court's curious holding in *Icicle Seafoods, Inc.* v. *Worthington*, 475 U. S. 709, 714 (1986), but it cannot affect the outcome of this case. Whether the Board has administered the provisions for paid leave for secular purposes strictly or permissively has no bearing on Philbrook's legally insufficient complaint that he

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[4] "The school board argues that we should find that its longstanding accommodation of three days of paid leave and additional days of unpaid leave for religious observance constitutes a reasonable accommodation and thus satisfies its duty to accommodate, citing the Tenth Circuit's decision in *Pinsker* v. *Joint District No. 28J*, 735 F. 2d 388, 391 (10th Cir. 1984). The *Pinsker* court held that a policy allowing two days of paid leave for religious reasons and additional days of unpaid leave satisfied the duty to accommodate. We presume that Ansonia's leave policy is 'reasonable.' *And if Title VII's duty to accommodate were to be defined without reference to undue hardship, we would hold that the school board has satisfied its burden.* The duty to accommodate, however, cannot be defined without reference to undue hardship. In many circumstances, more than one accommodation could be called 'reasonable.' Where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business." 757 F. 2d 476, 484 (CA2 1985) (emphasis added).

has some but not enough leave for religious purposes.[5] The employer has no duty to provide Philbrook with additional days of paid leave. Nor can the uses for which the board has historically allowed personal leave days possibly create a duty to pay Philbrook to perform the work he missed on days of religious obligation.

Accordingly, I respectfully dissent from the part of the Court's judgment that remands the case for further proceedings.

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[5] Though it is not necessary to my conclusion, the teachers' modest use of personal business days indicates that they are not treated as general leave days. In the 1982–1983 school year, for example, only 2 of the 131 teachers in the school system used all three days; 80 used none. Plaintiff's Exhibit 18.

In addition, the Board has strictly administered the use of necessary personal business days, limiting their use to the purposes not enumerated in the contract. The School Superintendent testified that the use of these three days' leave is closely monitored. Teachers may take one of these days in their discretion, without giving a reason for their absence, but must notify the principal or their superior of their absence 48 hours in advance. The Superintendent testified that he insures that teachers do not use that one discretionary day with pay for any of the reasons specifically enumerated in the contract:

"Q: If, in fact, you find that a teacher has utilized that one day for one of the reasons specifically listed in the contract for which days are separately allotted, what action, if any, would you take?

"A: If I found out, they would be deducted a day's salary for that one day." App. 65.

The other two days of necessary personal leave must be approved by the Superintendent with 48 hours' notice. The Superintendent reviews the request for leave, denying it if he does not consider it to be a necessary personal day. If the employee takes the day nonetheless, he or she is docked a day's pay. *Id.*, at 54.

CERBONE, JUSTICE OF THE VILLAGE COURT, VILLAGE OF MT. KISCO, NEW YORK, ET AL. *v.* CONWAY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1947. Argued November 5, 1986—Decided November 17, 1986

Certiorari dismissed. Reported below: 750 F. 2d 205 and 758 F. 2d 46.

Michael F. Close argued the cause for petitioners. With him on the brief was *George J. Calcagnini.*

George Russell Miller argued the cause and filed a brief for respondent.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

**Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Wallace, Charles A. Rothfeld, Barbara L. Herwig,* and *John F. Daly* filed a brief for the United States as *amicus curiae* urging reversal.

Steven R. Shapiro filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Syllabus

IMMIGRATION AND NATURALIZATION SERVICE *v.* HECTOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86–21. Decided November 17, 1986

Respondent, a native and citizen of Dominica, West Indies, remained in the United States illegally after her authorization to stay expired in 1975. Two of her minor nieces, United States citizens, came from Dominica to live with her in 1983 to attend school. In deportation proceedings instituted against her in 1983, respondent conceded deportability, but applied for suspension of deportation pursuant to § 244(a)(1) of the Immigration and Nationality Act, which authorizes the Attorney General, in his discretion, to suspend deportation and to adjust the illegal alien's status to that of an alien lawfully admitted for permanent residence, if, *inter alia*, deportation would result in extreme hardship to the alien or to "his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." An Immigration Judge and the Board of Immigration Appeals found that respondent could not demonstrate extreme hardship to herself or to the specified persons. The Board also determined, as a factual matter, that respondent's separation from her nieces would not constitute extreme hardship to herself, and, as a legal matter, that a niece is not a "child" within § 244(a)(1)'s meaning. On review, the Court of Appeals held that the Board erred in not giving sufficient consideration to whether respondent's relationship with her nieces was the functional equivalent of a parent-child relationship. Remanding the case, the court instructed the Board to determine whether there was such a relationship, and, if so, whether respondent's nieces would experience extreme hardship as a result of her deportation.

Held: The Board is not required under § 244(a)(1) to consider the hardship to a third party other than a spouse, parent, or child, as defined by the Act. The definition of the term "child" in § 101(b)(1) of the Act is particularly exhaustive. Even if respondent's relationship with her nieces closely resembles a parent-child relationship, Congress, through the statute's plain language, precluded the functional approach to defining the term "child."

Certiorari granted; 782 F. 2d 1028, reversed.

PER CURIAM.

Virginia Hector, a native and citizen of Dominica, West Indies, entered the United States in April 1975 as a nonimmigrant visitor for pleasure. She has remained in this country illegally since April 30, 1975, when her authorization to stay expired. The youngest of her four children, a 10-year-old boy, resides with her here; the other three children live with their grandparents in Dominica. In 1983, two of Hector's nieces, United States citizens aged 10 and 11, came to live with her in order to attend school in what their parents perceived to be a superior educational system. The nieces' parents continue to reside in Dominica.

The Immigration and Naturalization Service (INS) instituted deportation proceedings against Hector in July 1983. She conceded deportability, but applied for suspension of deportation pursuant to § 244(a)(1) of the Immigration and Nationality Act (Act), 66 Stat. 214, as amended, 8 U. S. C. § 1254(a)(1). That section authorizes the Attorney General, in his discretion, to suspend deportation of an illegal alien, and to adjust the alien's status to that of an alien lawfully admitted for permanent residence, if the deportable alien

> "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of . . . application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."

An Immigration Judge and the Board of Immigration Appeals (Board) found that Hector satisfied the first two statutory elements—continuous physical residence and good moral character—but that she could not demonstrate extreme hard-

ship to herself, or to her "spouse, parent, or child." With respect to her nieces, the Board determined that, as a factual matter, Hector's separation from them would not constitute extreme hardship to herself;[1] as a legal matter, the Board concluded that a niece is not a "child" within the meaning of § 244(a)(1).

The Court of Appeals for the Third Circuit granted Hector's petition for review and remanded the case to the Board. 782 F. 2d 1028 (1986). The court held that the Board had erred in not giving sufficient consideration to whether Hector's relationship with her nieces was the functional equivalent of a parent-child relationship. The court thus instructed the Board to ascertain whether there was a parental-type relationship, and, if so, to determine whether Hector's nieces would experience extreme hardship as a result of her deportation.[2]

In so holding, the court relied on its earlier decision in *Tovar* v. *INS*, 612 F. 2d 794 (1980), which held that the term "child" as used in § 244(a)(1) includes individuals who do not fit within the statutory definition of "child" set out in § 101(b)(1), 8 U. S. C. § 1101(b)(1), if their relationship with

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[1] The Board found that "[t]he emotional hardship to the respondent due to difficulties encountered by her nieces as a result of her deportation also does not constitute extreme hardship even when combined with the other factors in her case." App. to Pet. for Cert. 12a. Cf. *Contreras-Buenfil* v. *INS*, 712 F. 2d 401, 403 (CA9 1983); *Antoine-Dorcelli* v. *INS*, 703 F. 2d 19, 22 (CA1 1983).

[2] Both the Immigration Judge and the Board had also held, in the alternative, that Hector's relationship with her nieces was not akin to a mother and daughter relationship, and that, in any event, the nieces would not experience extreme hardship as a result of Hector's deportation. The Court of Appeals held, however, that the Board had foreclosed presentation of evidence on these issues, and had not meaningfully addressed each relevant factor. App. to Pet. for Cert. 4a. Judge Garth dissented, concluding that the Board has adequately considered Hector's relationship with her nieces and the hardship issue. *Id.*, at 5a, n. 1.

the deportable alien closely resembles that of a parent and child.[3]

Because we find the plain language of the statute so compelling, we reverse, and hold that the Board is not required under § 244(a)(1) to consider the hardship to a third party other than a spouse, parent, or child, as defined by the Act. Congress has specifically identified the relatives whose hardship is to be considered, and then set forth unusually detailed and unyielding provisions defining each class of included relatives.[4] The statutory definition of the term "child" is particularly exhaustive.[5] Hector has never claimed, and the

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[3] The Courts of Appeals have reached varying conclusions on whether hardship to an alien's relative or loved one who does not qualify under the statute's technical definitions as a spouse, parent, or child must be independently considered in assessing extreme hardship under § 244(a)(1). As indicated, the Third Circuit has held that the Board must look at the hardship that some third parties would experience, even if they do not qualify under the definitional section of the Act. See *Tovar* v. *INS*, 612 F. 2d 794, 797–798 (1980). A number of other Circuits have rejected this flexible approach. See, *e. g.*, *Zamora-Garcia* v. *United States Dept. of Justice INS*, 737 F. 2d 488 (CA5 1984); *Contreras-Buenfil*, *supra*, at 403.

[4] The term "parent" is defined in 8 U. S. C. § 1101(b)(2); the term "spouse" is defined in § 1101(a)(35).

[5] The definitional section provides:

"(b) As used in in subchapters I and II of this chapter—

"(1) The term "child" means an unmarried person under twenty-one years of age who is—

"(A) a legitimate child;

"(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

"(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

"(D) an illegitimate child by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

Court of Appeals did not hold, that the two nieces qualify under that statutory definition.

As we have explained with reference to the technical definition of "child" contained within this statute:

> "With respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to [some] who share strong family ties. . . . But it is clear from our cases . . . that these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress." *Fiallo* v. *Bell*, 430 U. S. 787, 798 (1977).

"(E) a child adopted while under the age of sixteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

"(F) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence: *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That no natural parent or prior adoptive parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter." § 1101(b)(1).

The suspension of deportation provision, § 1254(a), is part of subchapter II; this definition of "child" therefore applies.

Thus, even if Hector's relationship with her nieces closely resembles a parent-child relationship, we are constrained to hold that Congress, through the plain language of the statute,[6] precluded this functional approach to defining the term "child." Cf. *INS* v. *Phinpathya*, 464 U. S. 183, 194 (1984) (refusing to ignore "the clear congressional mandate and the plain meaning of the statute" where it was clear that "Congress considered the harsh consequences of its actions"). Congress has shown its willingness to redefine the term "child" on a number of occasions,[7] but it has not included

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[6]The limiting nature of the plain language is corroborated by the legislative history of both the suspension of deportation provision and the definitional section of the Act.

With respect to suspension of deportation, the Senate rejected a draft of the bill that focused on the hardship to the "immediate family." See S. 716, 82d Cong., 1st Sess. (1951). In a prepared analysis of S. 716, the INS expressed concern about this undefined term that the INS considered "obscure, uncertain, and difficult, if not impossible, to administer" since the language could "conceivably be claimed to include *any* relative of the alien, by blood or marriage, who might be living with him in his household." 4 INS, Analysis of S. 716, 82d Cong., 1st Sess., 244–2 and 244–3 (1951) (emphasis in original). Instead, the INS asked Congress to list the "particular relatives who are intended to be described." *Id.*, at 244–3. The bill that was eventually passed contained the "parent, spouse, or child" language that is now in effect.

The history of the definitional section similarly demonstrates that Congress has been actively engaged in delineating just how broad it wishes the definition of "child" to be. As originally enacted, the statute defined a "child" as an unmarried legitimate or legitimated child or stepchild under 21 years of age. See *Fiallo* v. *Bell*, 430 U. S., at 797. Congress has since repeatedly fine-tuned the definition of "child." There have been no less than four separate amendments, each adding to or refining the definition. See Act of Sept. 11, 1957, Pub L. 85–316, § 2, 71 Stat. 639; Act of Sept. 26, 1961, Pub. L. 87–301, §§ 1–4, 75 Stat. 650–651; Act of Oct. 3, 1965, Pub. L. 89–236, § 8(c), 79 Stat. 917; Act of Dec. 29, 1981, Pub. L. 97–116, 95 Stat. 1611. In light of this history of close congressional attention to this specific issue, we are especially bound to pay heed to the plain mandate of the words Congress has chosen.

[7]See n. 6, *supra*. Similarly, Congress has shown that it is willing to correct inequities that might result in our applying the plain language of

nieces in that definition or authorized us to adopt a functional definition.[8]

Accordingly, the petition for certiorari is granted, and the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN would grant the petition and set the case for oral argument.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See, *e. g.*, *Acosta* v. *Louisiana Dept. of Health and Human Resources*, 478 U. S. 251 (1986) (MARSHALL, J., dissenting).

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the suspension of deportation provision. In the recently enacted Immigration Reform and Control Act of 1986, Pub. L. 99–603, 100 Stat. 3359, Congress explicitly amended the Act to "overrule *INS* v. *Phinpathya*, [464 U. S. 183] (1984), which held that any absence, however brief, breaks the continuity of physical presence." H. R. Rep. No. 99–682, pt. 1, p. 124 (1986).

[8] Our decision, of course, does not affect the possibility that Hector may be entitled to relief under the amnesty provisions of the newly enacted Immigration Reform and Control Act of 1986, *supra*.

CITY OF NEWPORT, KENTUCKY, ET AL. *v.* IACOBUCCI, DBA TALK OF THE TOWN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86–139. Decided November 17, 1986

The City Commission of Newport, Ky., enacted an ordinance prohibiting nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises. Respondents, proprietors of Newport liquor establishments that offered nude or nearly nude entertainment, filed an action in Federal District Court contending that the ordinance deprived them of their rights under the First and Fourteenth Amendments. The court ruled that the ordinance was constitutional under the doctrine of *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714, which upheld a state law imposing an almost identical prohibition on nude dancing as being within the State's broad power under the Twenty-first Amendment to regulate the sale of liquor within its boundaries. The Court of Appeals reversed.

Held: The ordinance is constitutional. This case is controlled by *Bellanca*. The States' broad regulatory authority conferred by the Twenty-first Amendment in the context of liquor licensing includes the power to ban nude dancing and outweighs any First Amendment interest in nude dancing. The Court of Appeals misperceived this broad base for the *Bellanca* decision by concluding that because, under the Kentucky Constitution, a city cannot ban the sale of alcohol without approval by local election, it similarly cannot regulate nude dancing in bars. Generally, States may delegate their power under the Twenty-first Amendment as they see fit, and the fact that Kentucky has delegated one portion of its power to the electorate—the power to decide if liquor may be served in local establishments—does not differentiate this case from *Bellanca*.

Certiorari granted; 785 F. 2d 1354, reversed and remanded.

PER CURIAM.

In 1982, the City Commission of Newport, Ky., enacted Ordinance No. 0–82–85. This ordinance prohibited nude or nearly nude dancing in local establishments licensed to sell

liquor for consumption on the premises.[1] A state law imposing an almost identical prohibition on nude dancing was upheld by this Court in *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981) *(per curiam)*, as being within the State's broad power under the Twenty-first Amendment[2] to regulate the sale of liquor within its boundaries.

Respondents, proprietors of Newport liquor establishments that offered nude or nearly nude entertainment, challenged the ordinance in federal court. They contended that the ordinance deprived them of their rights under the First and Fourteenth Amendments, and they sought declaratory and injunctive relief under 42 U. S. C. § 1983 against its enforcement.[3] The District Court ruled that the ordinance was constitutional, stating that it "is squarely within the doc-

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[1] Newport Ordinance No. 0–82–85, § II, provides:

"It shall be unlawful for and a person is guilty of performing nude or nearly nude activity when that person appears on a business establishment's premises in such a manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, or when any female appears on a business establishment's premises in such manner or attire as to expose to view portion of the breast referred to as the areola, nipple, or simulation thereof."

Sections IV and V specify criminal and civil penalties for any violation of the ordinance. A proprietor who knowingly permits the proscribed activity on his premises may have his occupational license and liquor license revoked.

Ordinance No. 0–82–85 is set forth in its entirety in the appendix to the Court of Appeals' opinion. See 785 F. 2d 1354, 1360–1362 (CA6 1986).

[2] The Twenty-first Amendment provides in relevant part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[3] Respondents also challenged a second Newport ordinance, see 785 F. 2d, at 1362–1363, requiring employees of establishments that sell liquor by the drink to register with the Police Department and be fingerprinted. The Court of Appeals upheld the constitutionality of this second ordinance as a valid implementation of the city's police power. *Id.*, at 1355–1358. That ordinance is not at issue here.

trine of *Bellanca* . . . and must be upheld on that basis." App. to Pet. for Cert. 50a.

A divided panel of the United States Court of Appeals for the Sixth Circuit reversed that judgment. 785 F. 2d 1354 (1986). It found the decision in *Bellanca* inapplicable because in Kentucky local voters, rather than the city or the Commonwealth, determine whether alcohol may be sold. Pursuant to the authority granted by the Commonwealth's Constitution,[4] Kentucky expressly authorizes a city to conduct a popular election on a question of local prohibition when a specified proportion of qualified voters petition for such an election. See Ky. Rev. Stat. §§ 242.010–242.990 (1981 and Supp. 1986). Noting this Court's statement in *Bellanca* that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs," 452 U. S., at 717, the Court of Appeals' majority nevertheless concluded that the ordinance could not be justified under the broad authority bestowed by the Twenty-first Amendment. It stated that this case does not fall within the *Bellanca* "doctrine" or "rationale" because the city "cannot exercise in part a power it does not hold in full." 785 F. 2d, at 1358. The court remanded the case for a determination, among other things, of the city's authority to enact the ordinance under its police power. The dissenting judge argued that the majority read *Bellanca* too narrowly, and he contended that the city is not restricted solely to the exercise of the police power to regulate the liquor industry.

We agree with the dissent's conclusion that this case is controlled by *Bellanca*, and we therefore reverse. The reach of

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[4] The Kentucky Constitution, § 61, provides:

"The General Assembly shall, by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All elections on this question may be held on a day other than the regular election days."

the Twenty-first Amendment is certainly not without limit,[5] but previous decisions of this Court have established that, in the context of liquor licensing, the Amendment confers broad regulatory powers on the States.

> "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *California* v. *LaRue*, 409 U. S. 109, 114 (1972).

This regulatory authority includes the power to ban nude dancing as part of a liquor license control program. "In *LaRue* . . . we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program." *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 932–933 (1975). In *Bellanca*, the Court upheld a state statute imposing just such a ban.

The Court of Appeals misperceived this broad base for the ruling in *Bellanca* and seized upon a single sentence, characterizing it as the "doctrine" or "rationale" of *Bellanca*. Because a Kentucky city cannot ban the sale of alcohol without election approval, the court concluded that it similarly cannot

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[5] See, *e. g.*, *California* v. *LaRue*, 409 U. S. 109, 120, n. (1972) (Stewart, J., concurring):

"This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution. See *Wisconsin* v. *Constantineau*, 400 U. S. 433; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 329–334; *Dept. of Revenue* v. *James Beam Co.*, 377 U. S. 341."

regulate nude dancing in bars. In holding that a State "has broad power . . . to regulate the times, places, and circumstances under which liquor may be sold," *Bellanca*, 452 U. S., at 715, this Court has never attached any constitutional significance to a State's division of its authority over alcohol. The Twenty-first Amendment has given broad power to the States and generally they may delegate this power as they see fit.[6]

There is certainly no constitutional requirement that the same governmental unit must grant liquor licenses, revoke licenses, and regulate the circumstances under which liquor may be sold. Indeed, while Kentucky provides that the question of local prohibition is to be decided by popular election, the parties are in agreement that the city is vested with the power to revoke a liquor license upon a finding of a violation of state law, a state liquor regulation, or a city ordinance. See Brief in Opposition 7. Yet, the rationale of the opinion of the Court of Appeals implies that, because of the Kentucky Constitution, neither the State nor the city may revoke a liquor license under the authority of the Twenty-first Amendment. Only a strained reading of *Bellanca* would require each licensing decision to be made by plebiscite. Moreover, there is no statutory provision that gives the voters direct authority, once the sale of alcohol is permitted, to determine the manner of regulation. Thus, if respondents were to prevail in their argument that only voters can ban nudity because only voters have the authority to ban the sale of alcohol, it is possible that nude dancing in bars would be immune from any regulation.

The Newport City Commission, in the preamble to the ordinance, determined that nude dancing in establishments serving liquor was "injurious to the citizens" of the city. It found the ordinance necessary to a range of purposes, including "prevent[ing] blight and the deterioration of the City's neigh-

[6] Because it found *Bellanca* inapplicable, the Court of Appeals did not reach the state-law question of delegation of authority by the Commonwealth to the city of Newport. We express no opinion on this issue.

borhoods" and "decreas[ing] the incidence of crime, disorderly conduct and juvenile delinquency." See 785 F. 2d, at 1360. "Given the added presumption in favor of the validity of the . . . regulation in this area that the Twenty-first Amendment requires," *California* v. *LaRue*, 409 U. S., at 118–119, it is plain that, as in *Bellanca*, the interest in maintaining order outweighs the interest in free expression by dancing nude. The fact that the Commonwealth of Kentucky has delegated one portion of its power under the Twenty-first Amendment to the electorate—the power to decide if liquor may be served in local establishments—does not differentiate this case from *Bellanca*.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA would grant the petition for a writ of certiorari and set the case for oral argument.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See, *e. g.*, *Acosta* v. *Louisiana Dept. of Health and Human Resources*, 478 U. S. 251 (1986) (MARSHALL, J., dissenting).

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

As I have previously written, the reasoning in the *per curiam* summary disposition in *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981), is "blatantly incorrect." *Id.*, at 725 (STEVENS, J., dissenting). Neither the plain language nor a fair construction of the purpose of the Twenty-first Amendment lends any support to the Court's holding that the Twenty-first Amendment shields restrictions on speech from full First Amendment review. Without repeating what I said in that opinion, I believe it important

to highlight some of the fundamental defects in the Court's analysis.

At one time, not long ago, it was considered elementary that the Twenty-first Amendment merely created an exception to the normal operation of the Commerce Clause. See *Craig* v. *Boren*, 429 U. S. 190, 206 (1976). As the Court explained shortly after the Amendment's passage, the Amendment "sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc* v. *Reeves*, 308 U. S. 132, 138 (1939); see also *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936).

In *Craig* the Court flatly rejected the Twenty-first Amendment as a basis for sustaining a state liquor regulation that otherwise violated the Equal Protection Clause. The Court pointed out that, "[a]s one commentator has remarked: 'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.'" 429 U. S., at 206 (quoting P. Brest, Processes of Constitutional Decisionmaking, Cases and Materials 258 (1975)); see also *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 122, n. 5 (1982); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 178–179 (1972); *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1971).

In recent years, however, the Court has completely distorted the Twenty-first Amendment. It now has a barely discernible effect in Commerce Clause cases, see, *e. g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573 (1986); *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 279 (1984), but, under *Bellanca* and the Court's decision today, it may be dispositive in First Amendment cases. This paradox cannot be overstated: reading *Bellanca* one would have thought that the Court was prepared to recognize some bite in the Twenty-first Amendment. The intervening decisions in *Brown-Forman* and *Bacchus*

demonstrate, however, that it is toothless except when freedom of speech is involved.[1]

Were this internal inconsistency in interpreting the Twenty-first Amendment the only problem with the Court's analysis, that would still be enough to call these decisions into question. But the problem is far more severe and dangerous than that. The Court has a duty in this case to "assess the substantiality of the governmental interests asserted [and] determinine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment." *Schad* v. *Mount Ephraim*, 452 U. S. 61, 70 (1981). Shirking this responsibility, the Court instead relies exclusively on the Twenty-first Amendment to sustain a regulation of speech that it assumes, *arguendo*, would otherwise violate the First Amendment. Through the use of a *per curiam* summary disposition, the Court concludes that municipal ordinances and state statutes regu-

[1] The Court fails to explain how its treatment of freedom of speech in *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981), and this case is consistent with its discussion of the Twenty-first Amendment's lack of effect on the Bill of Rights in *Craig* v. *Boren*, 429 U. S. 190 (1976). Nor does the Court mention that in a post-*Bellanca* decision it unequivocally rejected the notion that a State may "exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 122, n. 5 (1982). There was absolutely no discussion of any added presumption of validity in *Larkin*.

These vastly different effects that the Court has attributed to the Twenty-first Amendment can surely not be explained as reflecting a difference in the value that is placed on free speech, from that which is placed on the Equal Protection Clause, or the Establishment Clause. In *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), the Court firmly declared that there is no "principled basis on which to create a hierarchy of constitutional values." *Id.*, at 484. In so stating, the Court declined to afford the Establishment Clause any special respect. Yet today, the Court not only appears to reject the proposition that all constitutional values are equivalent, but actually concludes that some of the other values protected by the First Amendment are at the low end of the sliding scale.

lating expression in business establishments licensed to sell liquor for consumption on the premises are equally immune from facial challenges predicated on the First Amendment.[2] Unlike its holding in *California* v. *LaRue*, 409 U. S. 109 (1972), the Court also concludes that there is no need to consider the substantiality of the evidence supporting the city's justification for its ordinance;[3] the articulation of a legiti-

[2] *Bellanca*, of course, dealt with the Twenty-first Amendment's effect on a state statute, not on a municipality's ordinance. The distinction between States and their subparts is dispositive in some areas of the law. See, *e. g.*, *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 48–52 (1982) (antitrust immunity for "state action"); *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 93–98 (1972) (Supreme Court's original jurisdiction); *Lincoln County* v. *Luning*, 133 U. S. 529 (1890) (Eleventh Amendment). Of course, in some other areas, a municipality is equated with the State. See, *e. g.*, *Waller* v. *Florida*, 397 U. S. 387 (1970) (double jeopardy); *Avery* v. *Midland County*, 390 U. S. 474, 480 (1968) (Fourteenth Amendment).

These cases demonstrate that the "particular factual and legal context is all important" in determining whether the state-municipality distinction is relevant. *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 430, n. 7 (1978) (Stewart, J., dissenting). Today, however, for the first time in the Twenty-first Amendment's history, the Court holds that it applies equally to municipalities. Until now, the Court had twice been faced with cases involving delegation of a State's Twenty-first Amendment authority, and it reserved passing on the delegation question in both cases. See *Grendel's Den*, 459 U. S., at 122; *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 933 (1975). I certainly would have thought that this question merits some analysis, even if it does not, in the Court's view, merit more than a *per curiam* summary reversal.

[3] In *LaRue*, California's Department of Alcoholic Beverage Control had held hearings on the problems that had become associated with nude dancing. Witnesses included representatives of law enforcement agencies, counsel, and owners of licensed premises, and Department investigators. 409 U. S., at 111. The evidence demonstrated that a wide range of illegal conduct, including juvenile prostitution, indecent exposure to young girls, rapes, and assault on police officers, was taking place in and around the nude dancing establishments. *Ibid.* The Court's decision to uphold the regulation was thus grounded in "the evidence from the hearings that [the Department] cited to the District Court." *Id.*, at 115. See also *Schad* v. *Mount Ephraim*, 452 U. S. 61, 69–73 (1981) (refusing to uphold infringe-

mate purpose in the preamble to the ordinance is sufficient. In the words of a student commentator, "one must inquire why the Court [chooses] to go to such extremes to avoid a first amendment analysis." Recent Developments—Constitutional Law, 19 Vill. L. Rev. 177, 185 (1973).

There are dimensions to this case that the Court's opinion completely ignores. To begin with, the Newport ordinance is not limited to nude dancing, "gross sexuality," or barrooms.[4] On the contrary, the ordinance applies to every business establishment that requires a liquor license, and, even then, its prohibition is not limited to nudity or to dancing.[5] The State's power to regulate the sale of alcoholic beverages extends to a host of business establishments other than ordinary bars. See Ky. Rev. Stat. § 243.020(3) (1981). For example, a theater cannot sell champagne during an intermission without a liquor license. It is surely strange to suggest that a dramatic production like "Hair" would lose its First Amendment protection because alcoholic beverages might be served

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ment of First Amendment rights where the State did not present actual evidence to support its purported justifications for the statute). This case stands in striking contrast; the Court of Appeals stated that "no substantive evidence concerning the government's justifications for the ordinance was presented" to the District Court. 785 F. 2d 1354, 1359 (1986).

[4] This is not to say that an ordinance limited to barrooms would necessarily be valid. As I suggested in *Bellanca*, 452 U. S., at 723, n. 10, a barroom might be the most appropriate forum for this type of entertainment since the patrons of such establishments generally know what to expect when they enter and they are free to leave if they disapprove of what they see or hear. Cf. *Splawn* v. *California*, 431 U. S. 595, 604 (1977) (STEVENS, J., dissenting) (bookstore's advertisement that it sold sexually provocative material put uninterested passersby on notice). This case is wholly unlike those in which we have recognized the legitimate interest in keeping pigs out of the parlor. Cf. *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 750 (1978). As long as people who like pigs keep them in secluded barnyards, they do not offend the sensibilities of the general public.

[5] The ordinance makes it a crime for any female to appear on a licensed business establishment's premises "in such manner or attire as to expose to view portion of the breast referred to as the areola, nipple, or simulation thereof."

in the lobby during intermission.[6] See *California* v. *LaRue*, 409 U. S., at 121 (Douglas, J., dissenting).

Perhaps the Court would disavow its rationale if a city sought to apply its ordinance to the performers in a play like "Hair," or to a production of "Romeo and Juliet" containing a scene that violates Newport's ordinance. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975). But such a disavowal would, I submit, merely confirm my view that the Twenty-first Amendment really has no bearing whatsoever on the question whether the State's interest in maintaining order in licensed premises outweighs the interest in free expression that is protected by the First Amendment—whether that interest is asserted by a dancer, an actor, or merely an unpopular customer.[7]

Similarly, I recognize that the Court's attention in this case is focused on the specter of unregulated nudity, particularly sexually suggestive dancing. But if there is any integrity to the Court's reasoning on the State's power under the Twenty-first Amendment, it must also embrace other forms of expressive conduct or attire that might be offensive to the majority, or perhaps likely to stimulate violent reactions, but would nevertheless ordinarily be entitled to First Amend-

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[6] It is of no consolation that the bar owner can retain nude dancing as long as he forgoes his liquor license, or that a theater may run a production with some nudity as long as it does the same. See *California* v. *LaRue*, 409 U. S., at 136–137 (MARSHALL, J., dissenting). Even 23 years ago it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963); see generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

[7] One of the anomalies of the Court's approach is that Newport's ordinance would presumably be subject to vastly different scrutiny were a bar owner to sell only liquor that is produced within the State. Since the Twenty-first Amendment deals only with a State's power to regulate "transportation or importation into" the State, it would have no effect on a Kentucky bar selling Kentucky bourbon. In such a case, the full force of the First Amendment would apply.

ment protection.[8] For example, liquor cannot be sold in an athletic stadium, hotel, restaurant, or sidewalk cafe without a liquor license. According to the Court's rationale any restriction on speech—be it content based or neutral—in any of these places enjoys a presumption of validity. It is a strange doctrine indeed that implies that Paul Robert Cohen had a constitutional right to wear his vulgar jacket in a courtroom, but could be sent to jail for wearing it in Yankee Stadium. See *Cohen* v. *California*, 403 U. S. 15 (1971).

Given these concerns, I cannot concur in yet another summary disposition that gives such short shrift to these issues, without even the benefit of briefing on the merits. *Bellanca* should not be applied, much less extended,[9] without taking cognizance of the intervening decisions that have further limited the effect of the Twenty-first Amendment in other areas. Moreover, I continue to believe that the Court is quite wrong in proceeding as if the Twenty-first Amendment repealed not only the Eighteenth Amendment, but some undefined portion of the First Amendment as well.

I respectfully dissent.

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[8] Notwithstanding the Court's broad pronouncements on the omnipotence of the Twenty-first Amendment, I would hope that it would still "be most difficult to sustain a law prohibiting political discussions in places where alcohol is sold by the drink, even though the record may show, conclusively, that political discussions in bars often lead to disorderly behavior, assaults and even homicide." *Bellanca* v. *New York State Liquor Authority*, 50 N. Y. 2d 524, 531, n. 7, 407 N. E. 2d 460, 464, n. 7 (1980).

[9] See n. 2, *supra*.

CARGILL, INC., ET AL. *v.* MONFORT OF COLORADO, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 85–473. Argued October 6, 1986—Decided December 9, 1986

Section 16 of the Clayton Act entitles a private party to sue for injunctive relief against "threatened loss or damage by a violation of the antitrust laws." Respondent, the country's fifth-largest beef packer, brought an action in Federal District Court under § 16 to enjoin the proposed merger of petitioner Excel Corporation, the second-largest packer, and Spencer Beef, the third-largest packer. Respondent alleged that it was threatened with a loss of profits by the possibility that Excel, after the merger, would lower its prices to a level at or above its costs in an attempt to increase its market share. During trial, Excel moved for dismissal on the ground that respondent had failed to allege or show that it would suffer antitrust injury, but the District Court denied the motion. After trial, the District Court held that respondent's allegation of a "price-cost squeeze" that would severely narrow its profit margins constituted an allegation of antitrust injury. The Court of Appeals affirmed, holding that respondent's allegation of a "price-cost squeeze" was not simply one of injury from competition but was a claim of injury by a form of predatory pricing in which Excel would drive other companies out of the market.

Held:

1. A private plaintiff seeking injunctive relief under § 16 must show a threat of injury "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489. Pp. 109–113.

2. The proposed merger does not constitute a threat of antitrust injury. A showing, as in this case, of loss or damage due merely to increased competition does not constitute such injury. And while predatory pricing is capable of inflicting antitrust injury, here respondent neither raised nor proved any claim of predatory pricing before the District Court, and thus the Court of Appeals erred in interpreting respondent's allegations as equivalent to allegations of injury from predatory conduct. Pp. 113–119.

3. This Court, however, will not adopt in effect a *per se* rule denying competitors standing to challenge acquisitions on the basis of preda-

tory-pricing theories. Nothing in the Clayton Act's language or legislative history suggests that Congress intended this Court to ignore injuries caused by such anticompetitive practices as predatory pricing. Pp. 120–122.

761 F. 2d 570, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, POWELL, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 122. BLACKMUN, J., took no part in the consideration or decision of the case.

Ronald G. Carr argued the cause for petitioners. With him on the briefs were *Robert F. Hanley*, *Alan K. Palmer*, and *Phillip Areeda*.

Deputy Solicitor General Cohen argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Ginsburg*, *Deputy Assistant Attorney General Cannon*, *Jerrold J. Ganzfried*, *Catherine G. O'Sullivan*, *Andrea Limmer*, and *Marcy J. K. Tiffany*.

William C. McClearn argued the cause for respondent. With him on the brief were *James E. Hartley*, *Elizabeth A. Phelan*, and *Marcy G. Glenn*.*

JUSTICE BRENNAN delivered the opinion of the Court.

Under § 16 of the Clayton Act, 38 Stat. 737, as amended, 15 U. S. C. § 26, private parties "threatened [with] loss or damage by a violation of the antitrust laws" may seek injunctive relief. This case presents two questions: whether a plaintiff seeking relief under § 16 must prove a threat of antitrust injury, and, if so, whether loss or damage due to increased competition constitutes such injury.

**Thomas B. Leary* filed a brief for the Business Roundtable as *amicus curiae* urging reversal.

David L. Foster and *Kim Sperduto* filed a brief for Royal Crown Cola Co. as *amicus curiae*.

I

Respondent Monfort of Colorado, Inc. (Monfort), the plaintiff below, owns and operates three integrated beef-packing plants, that is, plants for both the slaughter of cattle and the fabrication of beef.[1] Monfort operates in both the market for fed cattle (the input market) and the market for fabricated beef (the output market). These markets are highly competitive, and the profit margins of the major beef packers are low. The current markets are a product of two decades of intense competition, during which time packers with modern integrated plants have gradually displaced packers with separate slaughter and fabrication plants.

Monfort is the country's fifth-largest beef packer. Petitioner Excel Corporation (Excel), one of the two defendants below, is the second-largest packer. Excel operates five integrated plants and one fabrication plant. It is a wholly owned subsidiary of Cargill, Inc., the other defendant below, a large privately owned corporation with more than 150 subsidiaries in at least 35 countries.

On June 17, 1983, Excel signed an agreement to acquire the third-largest packer in the market, Spencer Beef, a division of the Land O'Lakes agricultural cooperative. Spencer Beef owned two integrated plants and one slaughtering plant. After the acquisition, Excel would still be the second-largest packer, but would command a market share almost equal to that of the largest packer, IBP, Inc. (IBP).[2]

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[1] As the District Court explained, "'[f]abrication' is the process whereby the carcass is broken down into either whole cuts (referred to as 'primals', 'subprimals' and 'portions') or ground beef." 591 F. Supp. 683, 690 (Colo. 1983). Whole cuts that are then vacuum packed before shipment are called "boxed beef"; the District Court found that "80% of all beef received at the retail supermarket level and at the hotel, restaurant, and institutional ('HRI') level" is boxed beef. *Ibid.*

[2] The District Court relied on the testimony of one of Monfort's witnesses in determining market share. *Id.*, at 706–707. According to this testimony, Monfort's share of the cattle slaughter market was 5.5%, Excel's share was 13.3%, and IBP's was 24.4%. 1 App. 69. Monfort's

Monfort brought an action under § 16 of the Clayton Act, 15 U. S. C. § 26, to enjoin the prospective merger.[3] Its complaint alleged that the acquisition would "violat[e] Section 7 of the Clayton Act because the effect of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly in several different ways . . . ." 1 App. 19. Monfort described the injury that it allegedly would suffer in this way:

> "(f) *Impairment of plaintiff's ability to compete.* The proposed acquisition will result in a concentration of economic power in the relevant markets which threatens Monfort's supply of fed cattle and its ability to compete in the boxed beef market." *Id.*, at 20.

Upon agreement of the parties, the District Court consolidated the motion for a preliminary injunction with a full trial

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share of the production market was 5.7%, Excel's share was 14.1%, and IBP's share was 27.3%. *Id.*, at 64. After the merger, Excel's share of each market would increase to 20.4%. *Id.*, at 64, 69; 761 F. 2d 570, 577 (CA10 1985).

[3] Section 16 states:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff." 15 U. S. C. § 26.

on the merits. On the second day of trial, Excel moved for involuntary dismissal on the ground, *inter alia*, that Monfort had failed to allege or show that it would suffer antitrust injury as defined in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977). The District Court denied the motion. After the trial, the court entered a memorandum opinion and order enjoining the proposed merger. The court held that Monfort's allegation of "price-cost 'squeeze'" that would "severely narro[w]" Monfort's profit margins constituted an allegation of antitrust injury. 591 F. Supp. 683, 691–692 (Colo. 1983). It also held that Monfort had shown that the proposed merger would cause this profit squeeze to occur, and that the merger violated § 7 of the Clayton Act.[4] *Id.*, at 709–710.

On appeal, Excel argued that an allegation of lost profits due to a "price-cost squeeze" was nothing more than an allegation of losses due to vigorous competition, and that losses from competition do not constitute antitrust injury. It also argued that the District Court erred in analyzing the facts relevant to the § 7 inquiry. The Court of Appeals affirmed the judgment in all respects. It held that Monfort's allegation of a "price-cost squeeze" was not simply an allegation of injury from competition; in its view, the alleged "price-cost squeeze" was a claim that Monfort would be injured by what the Court of Appeals "consider[ed] to be a form of predatory pricing in which Excel will drive other companies out of the market by paying more to its cattle suppliers and charging less for boxed beef that it sells to institutional buyers and consumers." 761 F. 2d 570, 575 (CA10 1985). On the § 7 issue, the Court of Appeals held that the District Court's decision was not clearly erroneous. We granted certiorari, 474 U. S. 1049 (1985).

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[4] Section 7 prohibits mergers when the "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly," 15 U. S. C. § 18.

II

This case requires us to decide, at the outset, a question we have not previously addressed: whether a private plaintiff seeking an injunction under § 16 of the Clayton Act must show a threat of antitrust injury. To decide the question, we must look first to the source of the antitrust injury requirement, which lies in a related provision of the Clayton Act, § 4, 15 U. S. C. § 15.

Like § 16, § 4 provides a vehicle for private enforcement of the antitrust laws. Under § 4, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . , and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15. In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, we held that plaintiffs seeking treble damages under § 4 must show more than simply an "injury causally linked" to a particular merger; instead, "plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.*, at 489 (emphasis in original). The plaintiffs in *Brunswick* did not prove such injury. The plaintiffs were 3 of the 10 bowling centers owned by a relatively small bowling chain. The defendant, one of the two largest bowling chains in the country, acquired several bowling centers located in the plaintiffs' market that would have gone out of business but for the acquisition. The plaintiffs sought treble damages under § 4, alleging as injury "the loss of income that would have accrued had the acquired centers gone bankrupt" and had competition in their markets consequently been reduced. *Id.*, at 487. We held that this injury, although causally related to a merger alleged to violate § 7, was not an antitrust injury, since "[i]t is inimical to [the antitrust] laws to award damages" for losses stem-

ming from continued competition. *Id.*, at 488. This reasoning in *Brunswick* was consistent with the principle that "the antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Ibid.*, quoting *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 320 (1962) (emphasis in original).

Subsequent decisions confirmed the importance of showing antitrust injury under § 4. In *Blue Shield of Virginia* v. *McCready*, 457 U. S. 465 (1982), we found that a health-plan subscriber suffered antitrust injury as a result of the plan's "purposefully *anticompetitive scheme*" to reduce competition for psychotherapeutic services by reimbursing subscribers for services provided by psychiatrists but not for services provided by psychologists. *Id.*, at 483. We noted that antitrust injury, "as analyzed in *Brunswick*, is one factor to be considered in determining the redressability of a particular form of injury under § 4," *id.*, at 483, n. 19, and found it "plain that McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." *Id.*, at 483. Similarly, in *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519 (1983), we applied "the *Brunswick* test," and found that the petitioner had failed to allege antitrust injury. *Id.*, at 539–540.[5]

Section 16 of the Clayton Act provides in part that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss

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[5] A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons. See generally Page, The Scope of Liability for Antitrust Violations, 37 Stan. L. Rev. 1445, 1483–1485 (1985) (distinguishing concepts of antitrust injury and antitrust standing). Thus, in *Associated General Contractors* we considered other factors in addition to antitrust injury to determine whether the petitioner was a proper plaintiff under § 4. 459 U. S., at 540. As we explain, n. 6, *infra*, however, many of these other factors are not relevant to the standing inquiry under § 16.

or damage by a violation of the antitrust laws . . . ." 15 U. S. C. § 26. It is plain that § 16 and § 4 do differ in various ways. For example, § 4 requires a plaintiff to show actual injury, but § 16 requires a showing only of "threatened" loss or damage; similarly, § 4 requires a showing of injury to "business or property," cf. *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251 (1972), while § 16 contains no such limitation.[6] Although these differences do affect the nature of the injury cognizable under each section, the lower courts, including the courts below, have found that under both § 16 and § 4 the plaintiff must still allege an injury of the type the antitrust laws were designed to prevent.[7] We agree.

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[6] Standing analysis under § 16 will not always be identical to standing analysis under § 4. For example, the difference in the remedy each section provides means that certain considerations relevant to a determination of standing under § 4 are not relevant under § 16. The treble-damages remedy, if afforded to "every person tangentially affected by an antitrust violation," *Blue Shield of Virginia* v. *McCready*, 457 U. S. 465, 476–477 (1982), or for "all injuries that might conceivably be traced to an antitrust violation," *Hawaii* v. *Standard Oil Co.*, 405 U. S., at 263, n. 14, would "open the door to duplicative recoveries," *id.*, at 264, and to multiple lawsuits. In order to protect against multiple lawsuits and duplicative recoveries, courts should examine other factors in addition to antitrust injury, such as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under § 4. See *Associated General Contractors*, 459 U. S., at 544–545; *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977). Conversely, under § 16, the only remedy available is equitable in nature, and, as we recognized in *Hawaii* v. *Standard Oil Co.*, "the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." 405 U. S., at 261. Thus, because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16.

[7] See *Ball Memorial Hospital, Inc.* v. *Mutual Hospital Insurance, Inc.*, 784 F. 2d 1325, 1334 (CA7 1986); *Midwest Communications, Inc.* v. *Minnesota Twins, Inc.*, 779 F. 2d 444, 452–453 (CA8 1985), cert. denied, 476 U. S. 1163 (1986); *Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co.*, 753 F. 2d 1354, 1358 (CA6), cert. dism'd, 469 U. S. 1200

The wording concerning the relationship of the injury to the violation of the antitrust laws in each section is comparable. Section 4 requires proof of injury "by reason of anything forbidden in the antitrust laws"; § 16 requires proof of "threatened loss or damage by a violation of the antitrust laws." It would be anomalous, we think, to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred.

There is no indication that Congress intended such a result. Indeed, the legislative history of § 16 is consistent with the view that § 16 affords private plaintiffs injunctive relief only for those injuries cognizable under § 4. According to the House Report:

> "Under section 7 of the act of July 2, 1890 [revised and incorporated into Clayton Act as § 4], a person injured in his business and property by corporations or combinations acting in violation of the Sherman antitrust law, may recover loss and damage for such wrongful act. There is, however, no provision in the existing law authorizing a person, firm, corporation, or association to enjoin threatened loss or damage to his business or property by the commission of *such unlawful acts, and the purpose of this section is to remedy such defect in the law.*" H. R. Rep. No. 627, 63d Cong., 2d Sess., pt. 1, p. 21 (1914) (emphasis added).[8]

(1985); *Schoenkopf* v. *Brown & Williamson Tobacco Corp.*, 637 F. 2d 205, 210–211 (CA3 1980).

[8] See also S. Rep. No. 698, 63d Cong., 2d Sess., pt. 2, pp. 17–18, 50 (1914). Although the references to § 16 in the debates on the passage of the Clayton Act are scarce, those that were made are consistent with the House and Senate Reports. For example, in this excerpt from a provision-by-provision description of the bill, Representative McGillicuddy (a member of the House Judiciary Committee) stated:

"Under the present law any person injured in his business or property by acts in violation of the Sherman antitrust law may recover his damage. In fact, under the provisions of the law he is entitled to recover threefold damage whenever he is able to prove his case. There is no provision

Sections 4 and 16 are thus best understood as providing complementary remedies for a single set of injuries. Accordingly, we conclude that in order to seek injunctive relief under § 16, a private plaintiff must allege threatened loss or damage "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U. S., at 489. We therefore turn to the question whether the proposed merger in this case threatened respondent with antitrust injury.

III

Initially, we confront the problem of determining what Monfort alleged the source of its injury to be. Monfort's complaint is of little assistance in this regard, since the injury

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under the present law, however, to prevent threatened loss or damage even though it be irreparable. The practical effect of this is that a man would have to sit by and see his business ruined before he could take advantage of his remedy. In what condition is such a man to take up a long and costly lawsuit to defend his rights?

"The proposed bill solves this problem for the person, firm, or corporation threatened with loss or damage to property by *providing injunctive relief against the threatened act that will cause such loss or damage.* Under this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy. Thus the bill not only protects the individual from loss or damage, but it relieves him of the tremendous burden of long and expensive litigation, often intolerable." 51 Cong. Rec. 9261 (1914) (emphasis added).

Representative Floyd described the nature of the § 16 remedy in these terms:

"In section 16 . . . is a provision that gives the litigant injured in his business an entirely new remedy.

. . . . . .

". . . [S]ection 16 gives any individual, company, or corporation . . . or combination the right to go into court and enjoin the doing of these unlawful acts, instead of having to wait until the act is done and the business destroyed and then sue for damages. . . . [S]o that if a man is injured by a discriminatory contract, by a tying contract, by the unlawful acquisition of stock of competing corporations, or by reason of someone acting unlawfully as a director in two banks or other corporations, he can go into court and enjoin and restrain the party from committing such unlawful acts." *Id.*, at 16319.

alleged therein—"an impairment of plaintiff's ability to compete"—is alleged to result from "a concentration of economic power." 1 App. 19. The pretrial order largely restates these general allegations. Record 37. At trial, however, Monfort did present testimony and other evidence that helped define the threatened loss. Monfort alleged that after the merger, Excel would attempt to increase its market share at the expense of smaller rivals, such as Monfort. To that end, Monfort claimed, Excel would bid up the price it would pay for cattle, and reduce the price at which it sold boxed beef. Although such a strategy, which Monfort labeled a "price-cost squeeze," would reduce Excel's profits, Excel's parent corporation had the financial reserves to enable Excel to pursue such a strategy. Eventually, according to Monfort, smaller competitors lacking significant reserves and unable to match Excel's prices would be driven from the market; at this point Excel would raise the price of its boxed beef to supracompetitive levels, and would more than recoup the profits it lost during the initial phase. 591 F. Supp., at 691–692.

From this scenario two theories of injury to Monfort emerge: (1) a threat of a loss of profits stemming from the possibility that Excel, after the merger, would lower its prices to a level at or only slightly above its costs; (2) a threat of being driven out of business by the possibility that Excel, after the merger, would lower its prices to a level below its costs.[9] We discuss each theory in turn.

A

Monfort's first claim is that after the merger, Excel would lower its prices to some level at or slightly above its costs in order to compete with other packers for market share.

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[9] In its brief, Monfort also argues that it would be injured by "the trend toward oligopoly pricing" that could conceivably follow the merger. Brief for Respondent 18–20. There is no indication in the record that this claim was raised below, however, and so we do not address it here.

Excel would be in a position to do this because of the multiplant efficiencies its acquisition of Spencer would provide, 1 App. 74–75, 369–370. To remain competitive, Monfort would have to lower its prices; as a result, Monfort would suffer a loss in profitability, but would not be driven out of business.[10] The question is whether Monfort's loss of profits in such circumstances constitutes antitrust injury.

To resolve the question, we look again to *Brunswick* v. *Pueblo Bowl-O-Mat, supra.* In *Brunswick,* we evaluated the antitrust significance of several competitors' loss of profits resulting from the entry of a large firm into its market. We concluded:

> "[T]he antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for 'the protection of *competition,* not *competitors,*' *Brown Shoe Co.* v. *United States,* 370 U. S., at 320. It is inimical to the purposes of these laws to award damages for the type of injury claimed here." *Id.,* at 488.

The loss of profits to the competitors in *Brunswick* was not of concern under the antitrust laws, since it resulted only from continued competition. Respondent argues that the losses in *Brunswick* can be distinguished from the losses alleged here, since the latter will result from an increase, rather than from a mere continuation, of competition. The range of ac-

[10] In this case, Monfort has conceded that its viability would not be threatened by Excel's decision to lower prices: "Because Monfort's operations were as efficient as those of Excel, only below-cost pricing could remove Monfort as an obstacle." *Id.,* at 11–12; see also *id.,* at 5, and n. 6 ("Monfort proved it was just as efficient as Excel"); *id.,* at 18; 761 F. 2d, at 576 ("Monfort would only be harmed by sustained predatory pricing").

tions unlawful under § 7 of the Clayton Act is broad enough, respondent claims, to support a finding of antitrust injury whenever a competitor is faced with a threat of losses from increased competition.[11] We find respondent's proposed construction of § 7 too broad, for reasons that *Brunswick* illustrates. *Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Arthur S. Langenderfer, Inc.* v. *S. E. Johnson Co.*, 729 F. 2d 1050, 1057 (CA6), cert. denied, 469 U. S. 1036 (1984). The logic of

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[11] Respondent finds support in the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 for the view that Congress intends the courts to apply § 7 so as to protect the viability of small competitors. The Senate Report, for example, cites with approval this Court's statement in *United States* v. *Von's Grocery Co.*, 384 U. S. 270, 275 (1966), that "the basic purpose of the 1950 Celler-Kefauver Act [amending § 7 of the Clayton Act] was to prevent economic concentration in the American economy by keeping a large number of small competitors in business." S. Rep. No. 94–803, p. 63 (1976). Even if respondent is correct that Congress intended the courts to apply § 7 so as to keep small competitors in business at the expense of efficiency, a proposition about which there is considerable disagreement, such congressional intent is of no use to Monfort, which has conceded that it will suffer only a loss of profits, and not be driven from the market, should Excel engage in a cost-price squeeze. See n. 10, *supra*.

Brunswick compels the conclusion that the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury.

B

The second theory of injury argued here is that after the merger Excel would attempt to drive Monfort out of business by engaging in sustained predatory pricing. Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.[12] It is a prac-

[12] Most commentators reserve the term predatory pricing for pricing below some measure of cost, although they differ on the appropriate measure. See, *e. g.*, Areeda & Turner, Predatory Pricing and Related Practices under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975); McGee, Predatory Pricing Revisited, 23 J. Law & Econ. 289 (1980) (reviewing various proposed definitions). No consensus has yet been reached on the proper definition of predatory pricing in the antitrust context, however. For purposes of decision in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986), for example, we defined predatory pricing as either "(i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Id.*, at 585, n. 8. Definitions of predatory pricing also vary among the Circuits. Compare *Arthur S. Langenderfer, Inc.* v. *S. E. Johnson Co.*, 729 F. 2d 1050, 1056–1057 (CA6) (pricing below marginal or average variable cost presumptively illegal, pricing above such cost presumptively legal), cert. denied, 469 U. S. 1036 (1984), with *Transamerica Computer Co.* v. *International Business Machines Corp.*, 698 F. 2d 1377 (CA9) (pricing above average total costs may be deemed predatory upon showing of predatory intent), cert. denied, 464 U. S. 955 (1983).

Although neither the District Court nor the Court of Appeals explicitly defined the term predatory pricing, their use of the term is consistent with a definition of pricing below cost. Such a definition is sufficient for purposes of this decision, because only below-cost pricing would threaten to drive Monfort from the market, see n. 9, *supra*, and because Monfort made no allegation that Excel would act with predatory intent. Thus, in this case, as in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, *supra*, we find it unnecessary to "consider whether recovery should *ever* be available . . . when the pricing in question is above some measure of incre-

tice that harms both competitors *and* competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is thus a practice "inimical to the purposes of [the antitrust] laws," *Brunswick*, 429 U. S., at 488, and one capable of inflicting antitrust injury.[13]

The Court of Appeals held that Monfort had alleged "what we consider to be a form of predatory pricing . . . ." 761 F. 2d, at 575. The court also found that Monfort "could only be harmed by sustained predatory pricing," and that "it is impossible to tell in advance of the aquisition" whether Excel would in fact engage in such a course of conduct; because it could not rule out the possibility that Excel would engage in predatory pricing, it found that Monfort was threatened with antitrust injury. *Id.*, at 576.

Although the Court of Appeals did not explicitly define what it meant by predatory pricing, two interpretations are plausible. First, the court can be understood to mean that Monfort's allegation of losses from the above-cost "price-cost squeeze" was equivalent to an allegation of injury from predatory conduct. If this is the proper interpretation, then the court's judgment is clearly erroneous because (a) Monfort made no allegation that Excel would act with predatory intent after the merger, and (b) price competition is not predatory activity, for the reasons discussed in Part III–A, *supra*.

Second, the Court of Appeals can be understood to mean that Monfort had shown a credible threat of injury from below-cost pricing. To the extent the judgment rests on this ground, however, it must also be reversed, because Monfort

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mental cost," 475 U. S., at 585, n. 9, or whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation. See n. 11, *supra*.

[13] See also *Brunswick*, 429 U. S., at 489, n. 14 ("The short-term effect of certain anticompetitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened").

did not allege injury from below-cost pricing before the District Court. The District Court twice noted that Monfort had made no assertion that Excel would engage in predatory pricing. See 591 F. Supp., at 691 ("Plaintiff does not contend that predatory practices would be engaged in by Excel or IBP"); *id.*, at 710 ("Monfort does not allege that IBP and Excel will in fact engage in predatory activities as part of the cost-price squeeze").[14] Monfort argues that there is evidence in the record to support its view that it did raise a claim of predatory pricing below. This evidence, however, consists only of four passing references, three in deposition testimony, to the possibility that Excel's prices might dip below costs. See 1 App. 276; 2 App. 626, 666, 669. Such references fall far short of establishing an allegation of injury from predatory pricing. We conclude that Monfort neither raised nor proved any claim of predatory pricing before the District Court.[15]

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[14] The Court of Appeals may have relied on the District Court's speculation that the merger raised "a distinct possibility . . . of predatory pricing." 591 F. Supp., at 710. This statement directly followed the District Court's second observation that Monfort did not raise such a claim, however, and thus was clearly dicta.

[15] Even had Monfort actually advanced a claim of predatory pricing, we doubt whether the facts as found by the District Court would have supported it. Although Excel may have had the financial resources to absorb losses over an extended period, other factors, such as Excel's share of market capacity and the barriers to entry after competitors have been driven from the market, must also be considered.

In order to succeed in a sustained campaign of predatory pricing, a predator must be able to absorb the market shares of its rivals once prices have been cut. If it cannot do so, its attempt at predation will presumably fail, because there will remain in the market sufficient demand for the competitors' goods at a higher price, and the competitors will not be driven out of business. In this case, Excel's 20.4% market share after the merger suggests it would lack sufficient market power to engage in predatory pricing. See Williamson, Predatory Pricing: A Strategic and Welfare Analysis, 87 Yale L. J. 284, 292 (1977) (60% share necessary); Areeda & Turner, Williamson on Predatory Pricing, 87 Yale L. J. 1337, 1348 (1978) (60% share not enough). It is possible that a firm with a low market share might nev-

IV

In its *amicus* brief, the United States argues that the "danger of allowing a competitor to challenge an acquisi-

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ertheless have sufficient excess capacity to enable it rapidly to expand its output and absorb the market shares of its rivals. According to Monfort's expert witness, however, Excel's postmerger share of market capacity would be only 28.4%. 1 App. 66. Moreover, it appears that Excel, like the other large beef packers, operates at over 85% of capacity. *Id.*, at 135–136. Thus Excel acting alone would clearly lack sufficient capacity after the merger to satisfy all or most of the demand for boxed beef. Although it is conceivable that Excel could act collusively with other large packers, such as IBP, in order to make the scheme work, the District Court found that Monfort did not "assert that Excel and IBP would act in collusion with each other in an effort to drive others out of the market," 591 F. Supp., at 692. With only a 28.4% share of market capacity and lacking a plan to collude, Excel would harm only itself by embarking on a sustained campaign of predatory pricing. Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme. See n. 17, *infra*.

It is also important to examine the barriers to entry into the market, because "without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." *Matsushita*, 475 U. S., at 591, n. 15. In discussing the potential for oligopoly pricing in the beef-packing business following the merger, the District Court found significant barriers to entry due to the "costs and delays" of building new plants, and "the lack of [available] facilities and the cost [$20–40 million] associated with refurbishing old facilities." 591 F. Supp., at 707–708. Although the District Court concluded that these barriers would restrict entry following the merger, the court's analysis was premised on market conditions during the premerger period of competitive pricing. *Ibid.* In evaluating entry barriers in the context of a predatory pricing claim, however, a court should focus on whether significant entry barriers would exist *after* the merged firm had eliminated some of its rivals, because at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during competitive conditions might well prove insignificant. In this case, for example, although costs of entry into the current competitive market may be high, if Excel and others in fact succeeded in driving competitors out of the market, the facilities of the bankrupt competitors would then be available, and the record shows, without apparent contradiction, that shut-down plants could be producing efficiently in a matter of months and that equipment and a labor force could

tion on the basis of necessarily speculative claims of post-acquisition predatory pricing far outweighs the danger that any anticompetitive merger will go unchallenged." Brief for United States as *Amicus Curiae* 25. On this basis, the United States invites the Court to adopt in effect a *per se* rule "denying competitors standing to challenge acquisitions on the basis of predatory pricing theories." *Id.*, at 10.

We decline the invitation. As the foregoing discussion makes plain, *supra*, at 117–118, predatory pricing is an anticompetitive practice forbidden by the antitrust laws. While firms may engage in the practice only infrequently, there is ample evidence suggesting that the practice does occur.[16] It would be novel indeed for a court to deny standing to a party seeking an injunction against threatened injury merely because such injuries rarely occur.[17] In any case, nothing in

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readily be obtained, 1 App. 95–96. Similarly, although the District Court determined that the high costs of building new plants and refurbishing old plants created a "formidable" barrier to entry given "the low profit margins in the beef industry," 591 F. Supp., at 707, this finding speaks neither to the likelihood of entry during a period of supracompetitive profitability nor to the potential return on investment in such a period.

[16] See Koller, The Myth of Predatory Pricing: An Empirical Study, 4 Antitrust Law & Econ. Rev. 105 (1971); Miller, Comments on Baumol and Ordover, 28 J. Law & Econ. 267 (1985).

[17] Claims of threatened injury from predatory pricing must, of course, be evaluated with care. As we discussed in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, the likelihood that predatory pricing will benefit the predator is "inherently uncertain: the short-run loss [from pricing below cost] is definite, but the long-run gain depends on successfully neutralizing the competition. . . . [and] on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." 475 U. S., at 589. Although the commentators disagree as to whether it is ever rational for a firm to engage in such conduct, it is plain that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous. See, *e. g.*, *id.*, at 588–593 (discussing obstacles to successful predatory pricing conspiracy); R. Bork, The Antitrust Paradox 144–159 (1978); McGee, Predatory Pricing Revisited, 23 J. Law & Econ., at 291–300; Posner, The Chicago School of Antitrust Analysis, 127

the language or legislative history of the Clayton Act suggests that Congress intended this Court to ignore injuries caused by such anticompetitive practices as predatory pricing.

V

We hold that a plaintiff seeking injunctive relief under § 16 of the Clayton Act must show a threat of antitrust injury, and that a showing of loss or damage due merely to increased competition does not constitute such injury. The record below does not support a finding of antitrust injury, but only of threatened loss from increased competition. Because respondent has therefore failed to make the showing § 16 requires, we need not reach the question whether the proposed merger violates § 7. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN took no part in the consideration or decision of this case.

JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

This case presents the question whether the antitrust laws provide a remedy for a private party that challenges a horizontal merger between two of its largest competitors. The issue may be approached along two fundamentally different paths. First, the Court might focus its attention entirely on the postmerger conduct of the merging firms and deny relief

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U. Pa. L. Rev. 925, 939–940 (1979). As we stated in *Matsushita*, "predatory pricing schemes are rarely tried, and even more rarely successful." 475 U. S., at 589. Moreover, the mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because "cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.*, at 594.

unless the plaintiff can prove a violation of the Sherman Act. Second, the Court might concentrate on the merger itself and grant relief if there is a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete. Today the Court takes a step down the former path;[1] I believe that Congress has directed us to follow the latter path.

In this case, one of the major firms in the beef-packing market has proved to the satisfaction of the District Court, 591 F. Supp. 683, 709–710 (Colo. 1983), and the Court of Appeals, 761 F. 2d 570, 578–582 (CA10 1985), that the merger between Excel and Spencer Beef is illegal. This Court holds, however, that the merger should not be set aside because the adverse impact of the merger on respondent's profit margins does not constitute the kind of "antitrust injury" that the Court described in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977). As I shall demonstrate, *Brunswick* merely rejected a "novel damages theory," *id.*, at 490; the Court's implicit determination that *Brunswick* forecloses the appropriate line of inquiry in this quite different case is therefore misguided. In my view, a

[1] Whether or not it so intends, the Court in practical effect concludes that a private party may not obtain injunctive relief against a horizontal merger unless the actual or probable conduct of the merged firms would establish a violation of the Sherman Act. The Court suggests that, to support a claim of predatory pricing, a competitor must demonstrate that the merged entity is "able to absorb the market shares of its rivals once prices have been cut," either because it has a high market share or because it has "sufficient excess capacity to enable it rapidly to expand its output and absorb the market shares of its rivals." *Ante*, at 119–120, n. 15. The Court would also require a competitor to demonstrate that significant barriers to entry would exist after "the merged firm had eliminated some of its rivals . . . ." *Ante*, at 120, n. 15. Indeed, the Court expressly states that the antitrust laws "require the courts to protect small businesses . . . *only* against the loss of profits from *practices* forbidden by the antitrust laws." *Ante*, at 116 (emphasis added). By emphasizing postmerger conduct, the Court reduces to virtual irrelevance the related but distinct issue of the legality of the merger itself.

competitor in Monfort's position has standing to seek an injunction against the merger. Because Monfort must compete in the relevant market, proof establishing that the merger will have a sufficient probability of an adverse effect on competition to violate § 7 is also sufficient to authorize equitable relief.

I

Section 7 of the Clayton Act was enacted in 1914, 38 Stat. 731, and expanded in 1950, 64 Stat. 1125, because Congress concluded that the Sherman Act's prohibition against mergers was not adequate.[2] The Clayton Act, unlike the Sherman Act, proscribes certain combinations of competitors that do not produce any actual injury, either to competitors or to competition. An acquisition is prohibited by § 7 if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U. S. C. § 18. The legislative history teaches us that this delphic language was designed "to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." S. Rep. No. 1775, 81st Cong., 2d Sess., 4–5 (1950).[3] In *Brunswick*,

[2] "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914).

[3] This Court has described the legislative purpose of § 7 as follows:

"[I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 317–318 (1962) (footnote omitted).

supra, this Court recognized that § 7 is "a prophylactic measure, intended 'primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil . . . .'" 429 U. S., at 485 (quoting *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 597 (1957)).

The 1950 amendment to § 7 was particularly concerned with the problem created by a merger which, when viewed by itself, would appear completely harmless, but when considered in its historical setting might be dangerous to competition. As Justice Stewart explained:

> "The principal danger against which the 1950 amendment was addressed was the erosion of competition through the cumulative centripetal effect of acquisitions by large corporations, none of which by itself might be sufficient to constitute a violation of the Sherman Act. Congress' immediate fear was that of large corporations buying out small companies. A major aspect of that fear was the perceived trend toward absentee ownership of local business. Another, more generalized, congressional purpose revealed by the legislative history was to protect small businessmen and to stem the rising tide of concentration in the economy. These goals, Congress thought, could be achieved by 'arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency.' *Brown Shoe Co.* v. *United States*, [370 U. S.,] at 317." *United States* v. *Von's Grocery Co.*, 384 U. S. 270, 283–284 (1966) (dissenting).

Thus, a merger may violate § 7 of the Clayton Act merely because it poses a serious threat to competition and even though the evidence falls short of proving the kind of actual restraint that violates the Sherman Act, 15 U. S. C. § 1. The language of § 16 of the Clayton Act also reflects Congress' emphasis on probable harm rather than actual harm. Section 16 authorizes private parties to obtain injunctive re-

lief "against threatened loss or damage" by a violation of § 7.[4] The broad scope of the language in both § 7 and § 16 identifies the appropriate standing requirements for injunctive relief. As the Court has squarely held, it is the threat of harm, not actual injury, that justifies equitable relief:

> "The evident premise for striking [the injunction at issue] was that Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 16 of the Clayton Act, 15 U. S. C. § 26, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of 'threatened' injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury; . . . he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 130 (1969) (citations omitted).

Judged by these standards, respondent's showing that it faced the threat of loss from an impending antitrust violation clearly conferred standing to obtain injunctive relief. Re-

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[4] Section § 16 states, in relevant part:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . . ." 15 U. S. C. § 26.

spondent alleged, and in the opinion of the courts below proved, the injuries it would suffer from a violation of § 7:

> "Competition in the markets for the procurement of fed cattle and the sale of boxed beef will be substantially lessened and a monopoly may tend to be created in violation of Section 7 of the Clayton Act;
>
> "Concentration in those lines of commerce will be increased and the tendency towards concentration will be accelerated." 1 App. 21.

More generally, given the statutory purposes to protect small businesses and to stem the rising tide of concentration in particular markets, a competitor trying to stay in business in a changing market must have standing to ask a court to set aside a merger that has changed the character of the market in an illegal way. Certainly the businesses—small or large—that must face competition in a market altered by an illegal merger are directly affected by that transaction. Their inability to prove exactly how or why they may be harmed does not place them outside the circle of interested parties whom the statute was enacted to protect.

II

Virtually ignoring the language and history of § 7 of the Clayton Act and the broad scope of the Act's provision for injunctive relief, the Court bases its decision entirely on a case construing the "private damages action provisions" of the Act. *Brunswick*, 429 U. S., at 478. In *Brunswick*, we began our analysis by acknowledging the difficulty of meshing § 7, "a statutory prohibition against acts that have a potential to cause certain harms," with § 4, a "damages action intended to remedy those harms." *Id.*, at 486. We concluded that a plaintiff must prove more than a violation of § 7 to recover damages, "since such proof establishes only that injury may result." *Ibid.* Beyond the special nature of an action for treble damages, § 16 differs from § 4 because by its terms it requires only that the antitrust violation threaten

the plaintiff with loss or damage, not that the violation cause the plaintiff actual "injur[y] in his business or property." 15 U. S. C. § 15.

In the *Brunswick* case, the Court set aside a damages award that was based on the estimated additional profits that the plaintiff would have earned if competing bowling alleys had gone out of business instead of being acquired by the defendant. We concluded "that the loss of windfall profits that would have accrued had the acquired centers failed" was not the kind of actual injury for which damages could be recovered under § 4. 429 U. S., at 488. That injury "did not occur 'by reason of' that which made the acquisitions unlawful." *Ibid.*

In contrast, in this case it is the threatened harm—to both competition and to the competitors in the relevant market—that makes the acquisition unlawful under § 7. The Court's construction of the language of § 4 in *Brunswick* is plainly not controlling in this case.[5] The concept of "antitrust injury," which is at the heart of the treble-damages action, is simply not an element of a cause of action for injunctive relief that depends on finding a reasonable threat that an incipient disease will poison an entire market.

A competitor plaintiff who has proved a violation of § 7, as the *Brunswick* Court recognized, has established that injury may result. This showing satisfies the language of § 16 provided that the plaintiff can show that injury may result to him. When the proof discloses a reasonable probability that competition will be harmed as a result of a merger, I would also conclude that there is a reasonable probability that

[5] In *Brunswick*, we reserved this question, stating: "The issue for decision is a narrow one. . . . Petitioner questions only whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares." 429 U. S., at 484 (footnote omitted). Nor did we reach the issue of a competitor's standing to seek relief from a merger under § 16 in *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519 (1983). *Id.*, at 524, n. 5.

a competitor of the merging firms will suffer some corresponding harm in due course. In my opinion, that reasonable probability gives the competitor an interest in the proceeding adequate to confer standing to challenge the merger. To hold otherwise is to frustrate § 7 and to read § 16 far too restrictively.

It would be a strange antitrust statute indeed which defined a violation enforceable by no private party. Effective enforcement of the antitrust laws has always depended largely on the work of private attorney generals, for whom Congress made special provision in the Clayton Act itself.[6] As recently as 1976, Congress specifically indicated its intent to encourage private enforcement of § 16 by authorizing recovery of a reasonable attorney's fee by a plaintiff in an action for injunctive relief. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1396 (amending 15 U. S. C. § 26).

The Court misunderstands the message that Congress conveyed in 1914 and emphasized in 1950. If, as the District Court and the Court of Appeals held, the merger is illegal, it should be set aside. I respectfully dissent.

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[6] 15 U. S. C. § 15. This Court has emphasized the importance of the statutory award of fees to private antitrust plaintiffs as part of the effective enforcement of the antitrust laws. In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 130–131 (1969), the Court observed:

"[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."

See also *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 502 (1969); *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 262 (1972).

R. J. REYNOLDS TOBACCO CO. *v.* DURHAM COUNTY, NORTH CAROLINA, ET AL.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

No. 85–1021. Argued October 6, 1986—Decided December 9, 1986*

Appellant, a New Jersey corporation with its principal office and only manufacturing facilities located in North Carolina, blends tobacco imported from foreign countries with domestic tobacco in producing finished tobacco products virtually all of which are consumed in the United States. Upon importation, the foreign tobacco is placed under customs bond given by appellant, and is stored in one or more of the customs-bonded warehouses owned and maintained by appellant in appellee Forsyth and Durham Counties, N. C., usually for a 2-year period to permit aging. Appellant pays the required customs duties upon withdrawal of the tobacco from the warehouses. Under North Carolina statutes, tobacco present in the State on January 1 of each year is subject to a nondiscriminatory ad valorem property tax levied and collected by counties and municipalities. In listing its taxable personal property for 1983 in appellee counties, appellant claimed that, under the ruling in *Xerox Corp.* v. *County of Harris*, 459 U. S. 145, its imported tobacco in customs-bonded warehouses was immune from state taxation on federal constitutional grounds. The counties' tax supervisors denied the claim, and the denials were upheld on administrative appeals. The North Carolina Court of Appeals affirmed, rejecting appellant's contentions that the tax violated the Import-Export and Due Process Clauses, and distinguished *Xerox*, reasoning that it prohibited state taxation only of imported goods stored under bond and awaiting export, not of those destined for domestic manufacture and consumption. Appellant filed with the North Carolina Supreme Court both a notice of appeal and a petition for discretionary review. The court granted a motion to dismiss for lack of a substantial constitutional question and denied appellant's petition. Appellant then filed with this Court an appeal from the North Carolina Supreme Court and another appeal from the North Carolina Court of Appeals.

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*Together with No. 85–1022, *R. J. Reynolds Tobacco Co.* v. *Durham County, North Carolina, et al.*, on appeal from the Court of Appeals of North Carolina.

Held:

1. This Court has appellate jurisdiction as to the North Carolina Supreme Court's judgment, under 28 U. S. C. § 1257(2), which extends such jurisdiction to review a "final" judgment "rendered by the highest court of a State in which a decision could be had . . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." Pp. 136–139.

(a) Appellant properly challenged on federal constitutional grounds the validity of North Carolina's ad valorem property tax, and there was a final judgment in favor of validity. Cf. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434. Pp. 136–138.

(b) The appeal from the North Carolina Supreme Court, not the North Carolina Court of Appeals, is the proper one under § 1257(2). A North Carolina statute gives a litigant an appeal of right to the State Supreme Court from any Court of Appeals decision that "directly involves a substantial question arising under the Constitution of the United States." In the absence of positive assurance to the contrary by the North Carolina Supreme Court, its grant of appellees' motion to dismiss the appeal for lack of a substantial federal constitutional question constitutes a decision on the merits affirming the Court of Appeals' judgment, not a determination that the State Supreme Court lacked jurisdiction over the appeal. Pp. 138–139.

2. Consistent with the Supremacy Clause, a State may impose a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse and destined for domestic manufacture and sale. The holding in *Xerox Corp.* v. *County of Harris*, *supra*, is limited to its factual situation, that is, where taxed imported goods in customs-bonded warehouses are intended for transshipment in foreign commerce. North Carolina's taxation of appellant's goods does not contradict the purposes of the federal statutory scheme governing customs-bonded warehouses to promote foreign commerce and to aid certain sectors of American economic life. To invalidate the North Carolina tax would place domestic tobacco, which is subject to the ad valorem property tax while aging, at a distinct disadvantage to the imported tobacco; domestic producers and local taxpayers would "subsidize" the growers of imported tobacco. Nor does the taxation here conflict with the central purpose behind customs-bonded warehouses: to ensure that federal customs duties are collected. The federal statutes and regulations that guide monitoring the movement of imported goods and the warehouse proprietor's conduct with respect to such goods both guarantee the collection of federal revenues and are not so comprehensive as to leave no room for North Carolina's assessment of ad valorem taxes. Pp. 139–152.

3. Application of the North Carolina tax to appellant's imported tobacco does not violate the Import-Export Clause. The focus of Import-Export Clause cases is on the nature of the tax at issue, not the nature of the goods as imports. North Carolina's tax does not offend the policies behind the Clause: concern that a state tax might interfere with federal regulation of foreign commerce; fear that on account of such state taxation the Federal Government will lose an important source of revenue; and a desire to maintain harmony among the States, which would be disturbed if seaboard States could tax goods merely flowing through their ports to other States not so favorably situated. Cf. *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276. Pp. 152–155.

4. North Carolina's tax does not violate the Due Process Clause. A state tax comports with the Clause if the taxing power exerted by the State bears a "fiscal relation" to protection, opportunities, and benefits given by the State. In light of the police, fire, and other services provided to appellant's imported tobacco by North Carolina counties and cities, such a "fiscal relation" clearly exists in this case. P. 156.

No. 85–1021, 314 N. C. 540, 335 S. E. 2d 21, affirmed. No. 85–1022, appeal dismissed; reported below: 73 N. C. App. 475, 326 S. E. 2d 911.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Erwin N. Griswold argued the cause for appellant in both cases. With him on the briefs were *Bob C. Griffo*, *Hugh Calkins*, *Kathleen B. Burke*, *John C. Duffy, Jr.*, *James W. McGrath*, *Thomas L. Kummer*, and *John A. Cocklereece, Jr.*

Rex E. Lee argued the cause for appellees in both cases. With him on the brief were *Carter G. Phillips*, *S. C. Kitchen*, *Thomas Russell Odom*, *P. Eugene Price, Jr.*, *Jonathan V. Maxwell*, and *John G. Wolfe III*.†

JUSTICE BLACKMUN delivered the opinion of the Court.

This case[1] presents the narrow but important question whether a State may impose a nondiscriminatory ad valorem property tax on imported goods stored under bond in a cus-

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†*Benna Ruth Solomon* and *Beate Bloch* filed a brief for the National Association of Counties et al. as *amici curiae* urging affirmance.

[1] Although there are two appeals (by the same appellant), there is but one case. See Part II, *infra*.

toms warehouse and destined for domestic manufacture and sale.

I

Appellant R. J. Reynolds Tobacco Company is a New Jersey corporation with its principal office in Winston-Salem, N. C. Reynolds manufactures finished tobacco products for sale to distributors and other authorized purchasers. App. to Juris. Statement 26a. Virtually all its products are consumed in the United States. *Id.*, at 31a. Its only manufacturing facilities are in Winston-Salem, where it blends imported tobacco with domestic tobacco in its manufacturing process.[2]

The foreign tobacco is shipped to a port of entry in the United States and is placed under customs bond given by Reynolds to secure the payment of federal import duties. See 19 U. S. C. § 1555 (1982 ed., Supp. III). The tobacco is then transported by truck or rail to one or more of the 88 customs-bonded warehouses owned and maintained by Reynolds in Forsyth and Durham Counties, N. C.[3] Because

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[2] The imported tobacco comes from Bulgaria, Syria, Lebanon, Brazil, and a few other places. App. to Juris. Statement 29a.

[3] Pursuant to federal regulation, a private party may have a building or part of a building designated as a customs-bonded warehouse for the purpose of storing imported goods. See 19 U. S. C. §§ 1555–1565 (1982 ed. and Supp. III); 19 CFR §§ 19.1–19.12 (1986). A customs officer supervises the operation of the warehouse, although labor on the stored merchandise is performed by the proprietor. The regulations prescribe, among other things, the manner in which goods enter and leave the warehouse, § 19.6, the records the proprietor must keep, § 19.12, and the supervision the customs officer is to perform, § 19.4.

Customs warehouses are divided into eight classes. § 19.1(a). Reynolds has two types, Class 2 and Class 8. Its Class 8 warehouses are storage sheds for the cleaning, sorting, and repacking of tobacco. See § 19.1(a)(8). Its Class 2 warehouses are used exclusively for the storage of tobacco. See § 19.1(a)(2). It is customary for Reynolds in the course of its manufacturing process to move imported tobacco from storage in its Class 8 warehouses to its Class 2 warehouses located in Reynolds' manufacturing areas. App. to Juris. Statement 30a. Reynolds owns these warehouses and the

nearly all imported tobacco requires aging, it is usually in the warehouses for two years. Reynolds pays the required customs duties upon withdrawal of tobacco from the warehouses. Reynolds stores its domestic tobacco in nonbonded warehouses in the same two counties. It receives identical city and county police, fire, and other public services at its customs-bonded and nonbonded warehouses. App. to Juris. Statement 32a.

Tobacco present in North Carolina on January 1 of each year is subject to an ad valorem property tax in the amount of 60% of the rate generally applicable to other property.[4] See N. C. Gen. Stat. §§ 105–277(a) and 105–285 (1985). Counties and municipalities are authorized to levy and collect property taxes, but they must do so in a manner uniform throughout the State. See § 105–272. In listing its taxable personal property for 1983 in Durham and Forsyth Counties, Reynolds claimed that, under this Court's ruling in *Xerox Corp.* v. *County of Harris*, 459 U. S. 145 (1982), its imported tobacco in customs-bonded warehouses was immune from taxation on federal constitutional grounds. App. 4–13. The tax supervisors for the respective counties denied this claim, and the County Boards of Equalization and Review upheld the denials. *Id.*, at 15–23.

Reynolds then filed appeals (consolidated for hearing) with the North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review. Reynolds again

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land thereunder, is their sole user, and pays all maintenance expenses and property taxes on them. *Id.*, at 30a, 32a.

Goods may remain in a customs-bonded warehouse for up to five years from the date of importation without payment of customs duties. 19 U. S. C. § 1557(a). Once goods are withdrawn, however, duties are due unless the goods are to be exported. *Ibid.* When Reynolds is ready to use imported tobacco, its practice is to pay the duty and to move the tobacco out of the Class 2 areas in order to process it with domestic tobacco. App. 90. When this move has been made, the imported tobacco is incorporated in the finished tobacco products within two weeks. *Id.*, at 91.

[4] There is no equal protection issue in this case.

contended that the taxation of the imported tobacco was at odds with *Xerox*. The Commission, however, found *Xerox* distinguishable because the warehoused goods under consideration in that case were destined for foreign markets and were lodged only temporarily in customs-bonded warehouses in this country, whereas Reynolds' tobacco was not so destined and had "nothing temporary about its existence in this country." App. to Juris. Statement 35a-36a. The Commission, *id.*, at 36a, likened the Reynolds facts, instead, to those of *American Smelting & Refining Co.* v. *County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), appeal dism'd, 396 U. S. 273 (1970), where a nondiscriminatory tax on imported goods stored in customs-bonded warehouses and destined for domestic consumption was upheld.

The North Carolina Court of Appeals affirmed the Commission's decision. *In re R. J. Reynolds Tobacco Co.*, 73 N. C. App. 475, 326 S. E. 2d 911 (1985). The court first rejected Reynolds' contention that the tax violated the Import-Export Clause, because the tax was clearly not an impost or duty. *Id.*, at 478–480, 326 S. E. 2d, at 914–915. The court then distinguished *Xerox*, reasoning that it prohibited state taxation only of goods stored under bond and awaiting export, not of those destined for domestic manufacture and consumption. 73 N. C. App., at 482–483, 326 S. E. 2d, at 916–917. Following the California Court of Appeal's conclusion in *American Smelting* that customs-bonded warehouses were not meant to create a "warehouse enclave" for foreign goods destined to be sold and consumed in domestic commerce, the North Carolina court observed that it would be unfair to "exempt imported tobacco aging in customs bonded warehouses from property taxation while imposing these taxes on domestically-grown tobacco aging in ordinary warehouses." 73 N. C. App., at 483–484, 326 S. E. 2d, at 917. Finally, the court dismissed Reynolds' due process claim, finding that the appropriate test was "'whether the taxing power exerted by the state bears fiscal relation to protection,

opportunities and benefits given by the state.'" *Id.*, at 485, 326 S. E. 2d, at 918, quoting *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940). Because there was no dispute that the imported tobacco received the benefit of local services, the imposition of the ad valorem tax did not constitute a due process violation. 73 N. C. App., at 485–486, 326 S. E. 2d, at 918.

Reynolds then filed with the North Carolina Supreme Court a notice of appeal and a petition for discretionary review. The Supreme Court granted the counties' subsequent motion to dismiss for lack of a substantial constitutional question and denied Reynolds' petition. *In re R. J. Reynolds Tobacco Co.*, 314 N. C. 540, 335 S. E. 2d 21 (1985).

Reynolds appealed to this Court.[5] We postponed consideration of our jurisdiction to the hearing on the merits. 475 U. S. 1009 (1986).

II

Under 28 U. S. C. § 1257, appellate jurisdiction lies in this Court to review a "final" judgment "rendered by the highest court of a State in which a decision could be had . . . (2) . . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

A

The initial jurisdictional question presented here is whether Reynolds properly challenged the validity of North Carolina's ad valorem property tax and whether there was a final judgment in favor of validity. Because the North Carolina Court of Appeals sustained the tax against Reynolds' claim that, as applied to its imported tobacco, the tax was repugnant to the Import-Export, Supremacy, and Due Process

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[5] Reynolds took care to file one appeal (No. 85–1021) from the North Carolina Supreme Court and another (No. 85–1022) from the North Carolina Court of Appeals. See App. to Juris. Statement 39a, 41a.

Clauses, and the North Carolina Supreme Court concluded that no substantial constitutional question was raised by the appeal, our appellate jurisdiction would seem to be assured. Appellees contend, however, that jurisdiction under § 1257(2) has not been established because Reynolds failed to make "'an explicit and timely insistence'" in the North Carolina courts that the State's tax statute, as applied to it, violated the Federal Constitution. Brief for Appellees 12, quoting *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 185 (1945). Appellees argue that Reynolds challenged merely the assessment or levy of the tax by North Carolina authorities, a situation where appellate jurisdiction does not lie. We find the argument unpersuasive.

In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979), this Court was faced with a similar challenge to appellate jurisdiction. Appellees in that case asserted that Japanese shipping companies had been denied only a constitutional immunity from taxation for their shipping containers and that the California courts had not sustained the tax statute against federal constitutional attack. See *id.*, at 440. Contrary to that suggestion, this Court found that the appellants had challenged the constitutionality of the tax statute, as applied, and that the California courts had sustained the statute's validity. *Id.*, at 441. We further observed that "a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *Ibid.*

The situation presented by the present case is like that in *Japan Line:* Reynolds explicitly drew the ad valorem property tax, as applied to its imported tobacco, into constitutional question, and the North Carolina courts upheld the validity of the tax. See also *Xerox Corp.* v. *County of Harris*, 459 U. S., at 149; *McCarty* v. *McCarty*, 453 U. S. 210, 219, n. 12 (1981). Thus, under § 1257(2), there was a final state-

court judgment in favor of the validity of the tax, and Reynolds properly challenged it.

B

Reynolds draws our attention to a jurisdictional detail that is unresolved. It has not been made clear which North Carolina court, in circumstances like those present here, is the "highest court" from which an appeal lies under § 1257. North Carolina, with exceptions not pertinent here, gives a litigant an appeal of right to its Supreme Court from any decision of its Court of Appeals that "directly involves a substantial question arising under the Constitution of the United States or of this State." N. C. Gen. Stat. § 7A-30 (Supp. 1985). As Reynolds explains, the grant of appellees' motion to dismiss the appeal for lack of a substantial federal constitutional question by the North Carolina Supreme Court could be interpreted as a decision on the merits affirming the Court of Appeals' judgment, or it could be viewed as a determination by that court that it lacked jurisdiction over the appeal. See Brief for Appellant 11. Depending upon how the dismissal is to be characterized, appeal here would properly lie from the Supreme Court or, on the other hand, from the Court of Appeals.[6]

We have resolved that we should decide this jurisdictional question so that practitioners may be certain of their ground. In the absence of positive assurance to the contrary from the North Carolina Supreme Court, we consider that court's dismissal of Reynolds' appeal to be a decision on the merits. Cf. *Michigan* v. *Long*, 463 U. S. 1032, 1037–1044 (1983). With no such contrary assurance in the present record, we

[6] Although Reynolds has informed this Court that the Clerk of the North Carolina Supreme Court advised it that a dismissal "for lack of a substantial constitutional question is not regarded by that Court as a decision on the merits," Reynolds observes that there is no reported decision of the Supreme Court of North Carolina that discusses the effect of such a dismissal. Brief for Appellant 11, n. 8.

conclude that it is the appeal from that court that is the proper one under § 1257.

When confronted with a comparable situation arising from Ohio, this Court ruled that the appeal lies from the Ohio Supreme Court and not from that State's Court of Appeals. See *Matthews* v. *Huwe*, 269 U. S. 262, 265 (1925); *Hetrick* v. *Village of Lindsey*, 265 U. S. 384, 386 (1924). See also *Tumey* v. *Ohio*, 273 U. S. 510, 515 (1927).[7] In *Matthews*, Chief Justice Taft, an Ohioan writing for the Court, explained the appropriateness of the appeal from the Ohio Supreme Court:

> "It is one of those not infrequent cases in which decision of the merits of the case also determines jurisdiction. The petition was dismissed, not because the court was really without jurisdiction, for it could have taken it, but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character one which the Court could consider." 269 U. S., at 265.

This reasoning is applicable to the present case: there is no question that the North Carolina Supreme Court had jurisdiction to hear Reynolds' appeal, but it determined not to do so in light of its conclusion that the appeal raised no substantial constitutional question.

We therefore regard the appeal in No. 85–1021 (from the Supreme Court of North Carolina) as the proper one, and we dismiss the appeal in No. 85–1022 (from the North Carolina Court of Appeals) for want of jurisdiction.

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[7] We acknowledge that this Court, in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), allowed certiorari to issue to an Ohio Court of Appeals after the Ohio Supreme Court had dismissed an appeal for lack of a substantial constitutional question. See *id.*, at 616. The "highest court" requirement, however, was not addressed in that case.

We note that treating the North Carolina Supreme Court's summary dismissal as a decision on the merits accords with this Court's view of its own summary dispositions. See *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975).

III

On the merits, the crucial issue is whether Congress has exercised its power under the Supremacy Clause to pre-empt ad valorem state taxation of imported goods that are stored in customs-bonded warehouses and that are destined for domestic markets. Under this Clause the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U. S. Const., Art. VI, cl. 2. In determining whether Congress has invoked this pre-emption power, we give primary emphasis to the ascertainment of congressional intent. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). This may be manifested in several ways. *Ibid.*; *Louisiana Public Service Comm'n* v. *FCC*, 476 U. S. 355 (1986). Chief among the indications of an intent to pre-empt is where Congress has legislated so comprehensively that it has left no room for supplementary state legislation. *Rice* v. *Santa Fe Elevator Corp.*, *supra*. Pre-emption may also be found where state legislation would impede the purposes and objectives of Congress. *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). In undertaking this analysis, however, we must be mindful of the principle that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U. S. 117, 127 (1973) ("So here, we may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties"). See *Brown* v. *Hotel Employees*, 468 U. S. 491, 500–501 (1984).

In *Xerox Corp.* v. *County of Harris*, 459 U. S. 145 (1982), this Court recently dealt with the issue of pre-emption of state

taxation on imported goods stored in customs-bonded warehouses. It there examined the narrow question "whether a state may impose nondiscriminatory ad valorem personal property taxes on imported goods stored under bond in a customs warehouse and destined for foreign markets." *Id.*, at 146.[8] At the outset of its pre-emption analysis, the Court in *Xerox*, examined the legislative history of the Warehousing Act of 1846, 9 Stat. 53, the forerunner of the present statutory scheme, in order to uncover the objectives behind the customs-bonded warehouse. The Court observed: "The Act stimulated foreign commerce by allowing goods in transit in foreign commerce to remain in secure storage, duty free, until they resumed their journey in export." 459 U. S., at 150. The Court further noted that making this country a center of world commerce was a desired and conceivable goal in light of our favorable geographic location between the Atlantic and Pacific Oceans that would facilitate the "transshipment of goods." *Id.*, at 150–151. Moreover, for the drafters of the Act, the promotion of foreign commerce went hand in hand with the growth of American shipping and mercantile industries. *Id.*, at 151. The Court concluded: "To these ends, Congress was willing to waive all duty on goods that were reexported from the warehouse, and to defer, for a

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[8] The facts in *Xerox* reinforce the narrowness of the question examined: the imported goods, Xerox copiers, were plainly designed for sale in Latin America, inasmuch as the operating instructions were in Spanish or Portuguese, the machines, as constructed, would not function on the type of electric current that is standard in the United States, it would have cost $100 to convert each machine for domestic sale, and none of the copiers was ever sold in the United States. 459 U. S., at 147–148. In fact, when Texas authorities began to assess ad valorem personal property taxes on the copiers, Xerox immediately shipped them to a foreign trade zone, from which it continued to send the machines to Latin America, and exhibited no intention to convert them for domestic use. *Id.*, at 148. Accordingly, in *Xerox* the bonded goods were destined to be shipped abroad, unlike Reynolds' tobacco, which is destined for domestic markets.

prescribed period, the duty on goods destined for American consumption." *Ibid.*

The Court, therefore, had to determine whether state taxation of the copiers destined for export would contradict the purpose of promoting foreign commerce and the related goal of aiding certain sectors of American economic life. It limited its pre-emption analysis to whether taxation would impede the congressional objectives. It particularly relied upon its earlier decision in *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414 (1940), where it had found that the federal warehouse scheme pre-empted a New York City sales tax on oil imported under customs bond, refined in a customs-bonded warehouse,[9] and sold as ships' stores for vessels destined for abroad. As the Court in *Xerox* noted, the tax at issue in *McGoldrick* would detract from the benefit American refiners received in their freedom from customs duties on the oil and thus undermined the advantage they gained in the competition with their foreign counterparts. 459 U. S., at 152 (citing *McGoldrick*, 309 U. S., at 429). Applying this reasoning to the case before it, the *Xerox* Court concluded that the waiver of customs duties benefited those merchants who used American ports "as transshipment centers," gave them a competitive advantage over importers using storage facilities in other countries, and thus promoted foreign commerce to the United States. 459 U. S., at 153. Because the waiver so clearly furthered the Act's purposes, any attempt to remove its benefit, such as would occur through state taxation, was incompatible with these goals. The Court thus ruled that state property tax on the copiers was pre-empted.[10]

[9] The warehouses with which *McGoldrick* was concerned were of Class 6, see 309 U. S., at 422, defined in the present regulations as those "for the manufacture in bond, solely for exportation, of articles made in whole or in part of imported materials or of materials subject to internal-revenue tax." 19 CFR § 19.1(a)(6) (1986); see also 19 U. S. C. § 1311.

[10] The Court remarked that the factual distinctions between *McGoldrick* and the case before it—namely, that in *McGoldrick* the oil could be sold only as ships' stores and the tax assessed was a sales tax, whereas Xerox

In a summary of its holding, however, this Court rather broadly stated that "state property taxes on goods stored under bond in a customs warehouse are pre-empted by Congress' comprehensive regulation of customs duties." *Id.*, at 154. Reynolds would conclude from that sentence that the holding in *Xerox* precludes state taxation of *any* goods in a customs warehouse, regardless of their destination.[11] As is

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could have paid the duty and withdrawn the copiers for domestic sale and was subject to a property tax—were "distinctions without a legal difference." *Xerox*, 459 U. S., at 153. According to Reynolds, this remark reveals that the Court was unconcerned in its analysis with whether the goods stored in customs-bonded warehouses were destined for domestic markets or for export. Taken in context, however, the Court's comment suggests the opposite to us: that Xerox had the option to sell the copiers domestically was not significant, given its clear intention to ship them to Latin America; thus, the copiers were as much destined for transshipment in foreign commerce as was the oil in *McGoldrick*. The difference in the types of taxes in the two cases was of no importance, for imposition of either tax would detract from the benefit accruing to the importer from the waiver of the duty.

That the Court in *Xerox* was concerned solely with goods destined for transshipment in foreign commerce is further demonstrated by the other case upon which it principally relied, *District of Columbia* v. *International Distributing Corp.*, 118 U. S. App. D. C. 71, 331 F. 2d 817 (1964), where the Court of Appeals proscribed a District of Columbia excise tax on the sale of beverages to foreign embassies while the beverages were still in a customs-bonded warehouse. Although this Court, 459 U. S., at 154, cited language from *International Distributing Corp.*, 118 U. S. App. D. C., at 73–74, 331 F. 2d, at 819–820, to the effect that customs-bonded warehouses were "federal enclaves free of state taxation" and goods housed therein were outside the taxing jurisdiction of the District until removed, the case appeared to turn on the fact that international law, recognized by Congress, granted diplomatic personnel the right to import goods duty free and tax free for their own use. *Id.*, at 74, 331 F. 2d, at 820. Arguably, then, the beverages at issue in *International Distributing Corp.* were still in foreign commerce. The Court's additional quotation from *Fabbri* v. *Murphy*, 95 U. S. 191, 197–198 (1877), see 459 U. S., at 154, is not inconsistent with this reading of *McGoldrick* and *International Distributing Corp.* See n. 24, *infra*.

[11] Reynolds also notes that counsel for both Xerox and the state taxing authorities expressed the opinion, in response to questions at oral argu-

clear from what has been said above, however, we accept *Xerox*'s holding and the quoted sentence as limited to the factual situation presented in that case, that is, where the goods are intended for transshipment.

It is difficult, moreover, to believe that the purposes in forming the customs-bonded warehouse scheme identified by the Court in *Xerox* would be disserved by the imposition of ad valorem property taxes on Reynolds' imported tobacco. It makes sense to conclude that state property taxation may discourage an importer whose goods are destined for transshipment in foreign commerce from using American ports and facilities, particularly when the same importer is granted an exemption from customs duties on all goods exported. Similar taxation would hardly deter an importer who, like Reynolds, stores goods in customs-bonded warehouses for up to two years for domestic manufacture and consumption, the storage period arguably being part of the manufacturing process because the tobacco requires aging.[12] Unlike Xerox,

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ment in the *Xerox* case in this Court, that the holding would apply either to goods destined for foreign commerce *or* to those earmarked for domestic use. Reynolds therefore argues here that the Court did intend its broad language to cover both types of goods. Brief for Appellant 17; Tr. of Oral Arg. 11–12. Although the questioning at oral argument in *Xerox* suggests that the Court may well have been inquiring into a situation different from the facts before it—not an infrequent occurrence at oral argument—the Court limited the analysis *in its opinion* to goods in transshipment.

[12] Because Reynolds' only manufacturing facility is in Forsyth County, there is no suggestion that Reynolds will discontinue its importation of foreign tobacco if the tax is allowed to stand, and that the tax thus will affect foreign commerce adversely. In fact, Reynolds has been importing foreign tobacco into North Carolina for approximately 25 years. See App. 88–89. Reynolds has been paying the North Carolina ad valorem property tax on its imported tobacco at least since this Court in *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976), abandoned the "original package" doctrine that had barred property taxes on imported inventory retained in its original package in the hands of the importer. That doctrine had prevented state taxation on Reynolds' imported tobacco. See Reply Brief for Appellant 7, n. 9. It may be noted, however, that Reynolds has filed suit in state court seeking refunds of property taxes it paid on imported

moreover, Reynolds is not completely free of import duties on its goods but simply has them deferred.[13] Thus, rather than being a charge that detracts from the absolute benefit of the waiver of duties, the state tax here is in addition to the payment of duties and might well be considered as nothing more than an expected cost of doing business. See *Xerox Corp.* v. *County of Harris*, 459 U. S., at 156 (POWELL, J., dissenting). Furthermore, while the tax on goods destined for foreign markets would have harmful effects on American industry and workers by discouraging importers from using American ships and ports, to invalidate the North Carolina tax would place domestic tobacco, which is subject to the ad valorem property tax while aging, at a distinct disadvantage to the imported tobacco. Domestic producers and local taxpayers would thus "subsidize" the growers of imported tobacco.[14] See *In re R. J. Reynolds*, 73 N. C. App., at 484,

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tobacco for 1980, 1981, and 1982, has paid under protest the taxes for 1984 and 1985, and has claimed—and been denied—an exemption for 1986. See Brief for Appellees 7, n. 8.

[13] The cost of the imported tobacco for which Reynolds sought exemption is $519,059,527. App. to Juris. Statement 28a–29a. The customs duties on this tobacco amount to approximately $42–48 million. *Id.*, at 32a. The tax at issue is about $5 million annually. Brief for Appellees 31, n. 34.

[14] North Carolina does grant domestic tobacco (and other "farm products") an exemption from taxation for the year following the one in which the product is grown if it is in "an unmanufactured state" and "owned by the original producer." 2D N. C. Gen. Stat. § 105–275(4) (1985). Although this tends to equalize competition between imported and domestic tobacco, it is not clear from the record that Reynolds' domestic tobacco is eligible for the benefit of § 105–275(4). Even if all of Reynolds' tobacco received the benefit of that provision, it would still not be on an equal competitive footing with imported tobacco, which would be exempt from property taxes for up to five years as long as it is stored in customs-bonded warehouses. See 19 U. S. C. § 1557(a).

There is no indication in the legislative history of the Warehousing Act that one of the goals of the customs-bonded warehouse system was to benefit imported goods in their competition with domestic goods. In fact, when the bill was debated in the Congress, legislators expressed concern

326 S. E. 2d, at 917 ("Also, since this imported tobacco receives the same local governmental services, such as police and fire protection, as domestic tobacco, local taxpayers

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that the deferral of duties would benefit the foreign merchant at his domestic counterpart's expense:

"The foreigner could warehouse his goods, safely and cheaply, for three years, without being compelled to pay the duties. He can sell the goods out as he finds customers; and by continuing the practice of invoicing his goods at a cheaper rate than the American merchant can, he will always place himself in a more advantageous position, and the effect would be to drive the latter out of business." Cong. Globe, 29th Cong., 1st Sess., 1042 (1846) (remarks of Sen. Huntington).

See also Cong. Globe, 29th Cong., 1st Sess., App. 1166 (1846) (remarks of Rep. Smith).

In response to these criticisms, Senator Dix, one of the sponsors of the bill in the Senate, explained that deferral of duties would not give foreign importers and goods such a benefit:

"Whether goods are stored in the countries where they are produced, or in our own cities, is of no consequence so far as the question of competition with our domestic products is concerned, unless it can be shown that in the latter case (storing in our own cities) they will be brought into the domestic market at a cost materially less. This, it is believed, cannot be readily shown. Whether stored at home or abroad, the expense of bringing merchandise into the domestic market must be nearly the same. In either case it has the same processes to perform. It must be transported from the factories or workshops where it is produced, to the sea; it must be shipped, carried across the ocean, brought into our ports, and before it can enter into the domestic market to be sold, the impost or duty must be paid. The charges and exactions are the same in both cases. If it is placed in store here and allowed to remain for a limited period without paying duty, it is in no better condition, so far as cost is concerned, than it would have been if it had been kept in store in the country where it was produced, unless storage here is cheaper, and this is questionable." *Id.*, at 795.

Senator Dix noted that some benefit might accrue to importers of foreign goods because of the deferral of duties (*i. e.*, interest on the amount for the duties during the deferral period), but he considered that to be immaterial and, in any event, more than offset by the promotion of foreign commerce. *Id.*, at 795–796. Thus, rather than believing that the Act improved the competitive position of foreign goods and their importers, Senator Dix disavowed this purpose and discounted any such effect.

would be forced to provide a subsidy in excess of a million dollars to Reynolds"). Permitting imposition of a tax thus leads to equal treatment for imported and domestic tobacco.

One of the Warehousing Act's major goals, manifested in its scheme of deferral and waiver of duties, was to promote the importer's flexibility with respect to his goods. Under the system in place prior to the Warehousing Act, an importer was required to pay the duties in cash when the goods were unloaded from the vessel; if no duties were paid, interest on them would immediately accrue and would have to be satisfied, or the customs officials would sell the goods for the charges. See Cong. Globe, 29th Cong., 1st Sess., App. 790 (1846) (remarks of Sen. Dix).[15] What this meant for the merchant who did not have a ready source of funds was that he would be forced to part with a portion of his goods, often in an unfavorable market, in order to raise money to pay the duties. *Id.*, at 792; see also H. R. Rep. No. 411, 29th Cong., 1st Sess., 1–3 (1846). Moreover, an importer who was unsure about the ultimate destination of the goods would be penalized by keeping them in warehouses in this country, for he would lose the benefit of the use of the money that had been paid for the customs duties. See Cong. Globe, 29th Cong., 1st Sess., App. 792 (1846) (remarks of Sen. Dix). By permitting an importer to defer duties for a set period of time and to have a waiver of duties on reexported goods, the Warehousing Act enabled the importer, without any threat of financial loss, to place his goods in domestic markets or to return them to foreign commerce and, by this flexibility, encouraged importers to use American facilities.[16]

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[15] The pre-Warehousing Act system, which required payment of a cash duty as high as 40% of the value of the goods, see H. R. Rep. No. 411, 29th Cong., 1st Sess., 1 (1846), was itself a response to an earlier system that had allowed importers to defer payment of customs duties for as long as nine months. See Cong. Globe, 29th Cong., 1st Sess., App. 790 (1846) (remarks of Sen. Dix).

[16] Although there were efforts in both the House and the Senate to require a merchant to designate at the outset which portion of his goods was

It is difficult to discern how imposition of an ad valorem tax will affect an importer's flexibility in a situation where, as here, goods are destined for domestic markets. Given that the tobacco is aging in the customs-bonded warehouses in preparation for domestic manufacture and sale in this country, Reynolds does not occupy the position of an importer looking for the best market, domestic or foreign, in which to place the stored goods.[17] In any event, Reynolds clearly benefits from the flexibility created by the Warehousing Act. By being allowed to defer customs duties on the imported tobacco for up to five years, Reynolds is able to decide how much imported tobacco to use in its manufacturing process at any given time, depending upon the demand for its products in the domestic market.

Nor is there any suggestion that taxation here would conflict with the central purpose behind the customs-bonded warehouses: to ensure that federal customs duties are collected. See *Xerox Corp.* v. *County of Harris*, 459 U. S., at 155 (POWELL, J., dissenting). Not only is the present statutory and regulatory framework sufficient to permit customs officials to monitor the entrance and removal of goods from warehouses and thus to guarantee collection of federal revenue, but Reynolds does not explain how, on the facts of this case, imposition of the North Carolina tax will prevent cus-

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intended for reexport or for domestic use, such attempts were rejected. See Journal of the Senate, 29th Cong., 1st Sess., 406–407 (1846); Cong. Globe, 29th Cong., 1st Sess., 1178 (1846). Rejection of such amendments suggests that Congress intended to give maximum flexibility to the importer who was unsure of the ultimate destination of the goods.

[17] We make no determination with respect to warehoused goods that are not, as are those here, destined for the domestic market. We leave for another day such questions as what degree of probability of shipment to foreign markets must be shown to invoke the tax exemption, and whether, with regard to goods for which that showing has been made, state taxes may nevertheless be annually assessed but not collected until release into the domestic market occurs.

toms officials from receiving the duties.[18] See n. 3, *supra*. And the present statutes and regulations that guide this monitoring and the warehouse proprietor's own conduct with respect to the imported goods are not so comprehensive as to leave no room for North Carolina's assessment of ad valorem taxes. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230; *Louisiana Public Service Comm'n* v. *FCC*, 476 U. S., at 370. Although the regulations are not themselves controlling on the pre-emption issue, see *Xerox Corp.* v. *County of Harris*, 459 U. S., at 152, n. 8, where, as in this case, Congress has entrusted an agency with the task of promulgating regulations to carry out the purposes of a statute, see 19 U. S. C. § 1556, as part of the pre-emption analysis we must consider whether the regulations evidence a desire to occupy a field completely. See *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153–154 (1982). Pre-emption should not be inferred, however, simply because the agency's regulations are comprehensive. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 716–718 (1985). In this case, the current regulations, while detailed, appear to contemplate some concurrent state regulation and, arguably, even state taxation.[19]

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[18] Although Reynolds suggests that practical problems may arise for an importer whose goods are subject to state taxation and who must decide which goods to designate for domestic use, Brief for Appellant 25, this case presents no such practical difficulties. Here, all the goods are destined for domestic manufacture. As has been noted, Reynolds has paid the tax in question for several years without, apparently, experiencing any serious difficulty. See n. 12, *supra*.

[19] For example, an applicant for the proprietorship of a bonded warehouse must estimate the "maximum duties and taxes" that will be due on goods stored therein at any one time. 19 CFR § 19.2(a) (1986). Under this regulation, state taxation is entirely consistent with the supervisory control over stored goods exercised by customs officers. Pursuant to § 19.7, moreover, warehoused goods shall be "liable for the expenses of labor and storage . . . and for all other expenses accruing upon the goods." Expenses might be read here to include state ad valorem property taxes. Under § 19.12(b)(3), to maintain the security of the merchandise a ware-

Finally, we agree with the North Carolina Court of Appeals that this case presents a factual situation similar to that in *American Smelting* and that the California Court of Appeal's reasoned decision is therefore pertinent.[20] The Court of Appeal considered whether metal-bearing ores and concentrates to be treated in a customs-bonded smelting and refining warehouse,[21] some to be reexported and others to be used in domestic markets, were subject to a local property tax. Relying upon *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414 (1940), the Court of Appeal concluded that the refined materials destined to reenter the exportation stream were exempt from local taxation. 271 Cal. App. 2d, at 481, 77 Cal. Rptr., at 601. With respect to similar materials intended for domestic consumption, however, the court concluded that "neither the laws, nor the regulations, nor the precedents . . . show a congressional intent to interfere with the right of the state to tax goods which have been imported for, and

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house proprietor is to comply with Treasury Regulations, but in the event of a conflict between them and "any local, state or Federal standard," the latter shall control. This suggests that dual federal and state regulation of customs-bonded warehouses is not only possible but contemplated under the regulations.

[20] Reynolds contends that in light of the decision in *Xerox* the summary dismissal in *American Smelting* is entitled to no precedential value. Reply Brief for Appellant 8. Given the limited focus in *Xerox*, we do not think that the decision in that case is at odds with *American Smelting* or affects the precedential weight, albeit limited, of the summary dismissal for want of a substantial federal question. See *American Smelting & Refining Co.* v. *County of Contra Costa*, 396 U. S. 273 (1970); *Hicks* v. *Miranda*, 422 U. S., at 344.

[21] It is irrelevant that the warehouses in *American Smelting* were Class 7 customs-bonded warehouses designed "for smelting and refining imported metal-bearing materials for exportation or domestic consumption," 19 CFR § 19.1(7) (1986); see also 19 U. S. C. § 1312(a), and different from the Class 2 and Class 8 warehouses at issue here. We note that *McGoldrick*, which the Court considered as precedent for its decision in *Xerox*, concerned Class 6 warehouses, designed for the manufacture of articles destined solely for exportation and not of the type used by Xerox. See n. 9, *supra*.

have been appropriated to, processing for domestic consumption." *Ibid.* The Court of Appeal could see no reason why state taxation on such goods would interfere with the primary benefit to be given the importer—deferral of the duties, and the Federal Government's concern with collecting its customs duties. It thus concluded that there was no reason why this taxation should depend upon *when* the goods were withdrawn from the warehouses. *Id.*, at 469–470, 77 Cal. Rptr., at 593–594. A customs-bonded warehouse was not to become an "enclave of foreign commerce," *id.*, at 470, 77 Cal. Rptr., at 594, nor was it to give the operator of the smelter a "bounty" that would enable it to prevail in its competition over "domestic smelters refining domestic ores." *Id.*, at 474, 77 Cal. Rptr., at 596–597. So also here, regardless of the imposition of the North Carolina ad valorem tax, Reynolds will be able to defer payment of the customs duties; the Federal Government will receive its customs revenue; and domestic producers of tobacco will not suffer in their competition with the imported tobacco.[22]

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[22] Reynolds also argues that the legislative history of the Trade and Tariff Act of 1984, Pub. L. 98–573, 98 Stat. 2948, which, among other things, amended the Foreign Trade Zones Act, ch. 590, 48 Stat. 998, codified, as amended, at 19 U. S. C. §§ 81a–81u (1982 ed. and Supp. III), shows that Congress understood the *Xerox* holding to be broad, *i. e.*, as prohibiting local taxation on *all* goods stored in customs warehouses. That legislation provides a statutory exemption from state and local property taxes for goods held in a foreign trade zone. While foreign trade zones are more difficult to establish than customs-bonded warehouses, they do permit a wider range of operations. See 19 U. S. C. § 81c (1982 ed., Supp. III); 1 R. Sturm, Customs Law & Administration § 18.1, pp. 45–52 (1986); Note, 17 Geo. Wash. J. Int'l L. & Econ. 555, 564–565 (1983). Reynolds buttresses its argument with statements in the legislative history to the effect that, by passing this amendment, Congress was bringing the prohibition of taxation of imported goods in foreign trade zones in line with a similar prohibition in customs-bonded warehouses. See, *e. g.*, 129 Cong. Rec. 14501 (1983) (statement of Sen. Tower); H. R. Rep. No. 98–267, p. 35 (1983); S. Rep. No. 98–308, p. 36 (1983). Just as in the case of imported goods in customs-bonded warehouses, those stored in foreign

We therefore hold that, consistent with the Supremacy Clause, a State may impose a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse and destined for domestic manufacture and sale.

IV

We turn to Reynolds' remaining constitutional arguments that the North Carolina ad valorem property tax violates the Import-Export[23] and Due Process Clauses. The Court has stated that its decision in *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976), "adopted a fundamentally different ap-

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trade zones are subject to import duties only when they are withdrawn for domestic consumption. See 19 U. S. C. § 81c (1982 ed., Supp. III).

Such statements given in the context of a different piece of legislation dealing with a different part of the customs scheme are not persuasive as to congressional purpose with respect to customs-bonded warehouses. See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 117–118, and n. 13 (1980) (congressional statements explaining intent of previous legislation are entitled to less weight than the statute's language and its legislative history before enactment). Moreover, the Trade and Tariff Act of 1984 had a narrow focus: the legislators from Texas sought to pre-empt state taxation of goods in foreign trade zones because Texas, alone among the States, permitted this taxation and thus businesses were discouraged from locating such zones in that State. See 129 Cong. Rec. 14501 (1983) (remarks of Sen. Bentsen) ("The Bentsen-Tower bill addresses a very narrow problem dealing with foreign trade zones in the State of Texas"). Foreign trade zones are valued because they actually promote domestic industry and create jobs. *Ibid.* Given that the taxation of goods in foreign trade zones could arguably harm domestic industry, while exemption from taxation of the imported goods in the present case would serve to discriminate against domestic producers, there appears to be a sufficient justification for the difference in state taxation with respect to these customs entities. There is no evidence that Reynolds also uses foreign trade zones for the purpose of aging its imported tobacco. Cf. *Xerox Corp.* v. *County of Harris*, 459 U. S., at 148 (when threatened with local taxes, Xerox immediately shipped its copiers to a foreign trade zone).

[23] "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except . . . ." U. S. Const., Art. I, § 10, cl. 2.

proach to cases claiming the protection of the Import-Export Clause." *Limbach* v. *Hooven & Allison Co.*, 466 U. S. 353, 359 (1984); see also *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734, 752–754 (1978). We explained this approach, and its distinction from the earlier analysis, in *Limbach:*

> "To repeat: we think it clear that this Court in *Michelin* specifically abandoned the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation that fell on imports. *Michelin* changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. The new focus is not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an 'Impost or Duty.'" 466 U. S., at 360.

In *Michelin*, we concluded that a Georgia nondiscriminatory ad valorem property tax, which had been assessed upon imported tires and tubes stored in a warehouse, was not the kind of tax prohibited by the Import-Export Clause, inasmuch as it did not offend the policies behind the Clause: concern that an impost or duty might interfere with the Federal Government's regulation of commercial relations with foreign governments; fear that on account of such state taxation the Federal Government would lose an important source of revenue; and a desire to maintain harmony among the States, which would be disturbed if seaboard States could tax goods "merely flowing through their ports" to other States not so favorably situated. 423 U. S., at 285–286.

The nondiscriminatory ad valorem property tax at issue here seems indistinguishable from the tax in *Michelin* in terms of these policies. The North Carolina tax does not interfere with the Federal Government's regulation of foreign commerce, for, as we have seen, it falls on imported and domestic goods alike and does not single out imported goods for unfavorable treatment. See *id.*, at 286. Having concluded

that the tax does not impede the collection of customs duties, it follows that it neither impairs an important source of revenue for the Federal Government nor replaces the federal duty with one of its own. *Ibid.* Rather, the property tax is nothing more than a means "by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth." *Id.*, at 287. If imposition of the tax happens to have the "incidental effect," *ibid.*, of discouraging some importation of foreign goods, prohibiting this result is not a function of the Import-Export Clause. Finally, in light of the services provided in exchange for this tax, it hardly constitutes the kind of exaction by the seaboard States on goods destined for inland States that the Framers sought to prevent by the Clause. *Id.*, at 288. A failure to assess the tax would shift the tax burden from Reynolds and the ultimate consumers of its tobacco products to the local taxpayers of North Carolina—a result completely at odds with *Michelin*. See *id.*, at 289. Accordingly, we conclude that the application of the tax to Reynolds' imported tobacco does not violate the Import-Export Clause.

This Court has observed that in *Michelin* it limited its holding to the imported goods "'no longer in transit.'" *Washington Revenue Dept.*, 435 U. S., at 755 (quoting *Michelin*, 423 U. S., at 302). Reynolds contends that, because goods stored in customs-bonded warehouses are by definition "in transit," this case does not fall within the scope of *Michelin*'s holding.[24] This reasoning, however, is unpersuasive.

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[24] For this argument, Reynolds particularly relies upon the *Xerox* Court's favorable citation of *International Distributing Corp.* to the effect that the goods in customs warehouses were outside the District of Columbia's jurisdiction, 459 U. S., at 154 (citing 118 U. S. App. D. C., at 73–74, 331 F. 2d, at 819–820), and the Court's remark that "'Congress did not regard the importation as complete while the goods remained in the custody of the proper officers of customs,'" *ibid.* (quoting *Fabbri* v. *Murphy*, 95 U. S., at 197–198). In our view, such reliance is misplaced. The Court in *Xerox* declined to reach the Import-Export Clause issue and was con-

The imported tobacco here, we repeat, has nothing transitory about it: it has reached its State—indeed, its county—of destination and only the payment of the customs duty, after the appropriate aging, separates it from entrance into the domestic market. More importantly, an automatic "in transit" status for goods stored in customs-bonded warehouses can be inferred only if Congress intended to confer it upon *all* goods stored in customs-bonded warehouses. See *Xerox Corp.* v. *County of Harris*, 459 U. S., at 157 (POWELL, J., dissenting). As we have seen, state taxation of such goods destined for domestic markets is contrary to none of the purposes for which Congress established the customs-bonded warehouse scheme. It strains reason to think that, although Congress could have directly pre-empted state taxation in this situation by declaring it to be in conflict with the purposes of customs-bonded warehouses or by directing the United States Customs Service to issue regulations governing taxation of stored goods, Congress decided to achieve the same effect in a more roundabout fashion by giving the goods the talismanic "in transit" status.

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cerned only with the possible pre-emption of state taxes in the limited context of goods destined to reenter the export stream. Thus, the citations are consistent with *Xerox*'s restricted conclusion that such goods should not be subject to ad valorem property taxes.

By themselves these cases do not give any significant weight to Reynolds' present contention. Although there is language in *International Distributing Corp.* concerning the locality's jurisdiction over goods in customs-bonded warehouses, as we observed above, see n. 10, *supra*, the decision turned on reciprocity in permitting diplomatic personnel to bring in goods duty and tax free and did not deal with the Import-Export Clause issue. Reynolds' reliance on *Fabbri* is not helpful either, because that case involved a dispute over whether an importer would be required to pay interest on the customs duty, in addition to the duty itself, when imported goods were withdrawn over a year after they had been stored. 95 U. S., at 193. Once again, no Import-Export Clause issue was raised in the case, and the remark from *Fabbri* specifically addresses the appropriateness of the interest charge: that interest was to be paid so long as the goods were in customs officials' custody. *Id.*, at 197–198.

We also find no merit in Reynolds' due process claim. As noted by the North Carolina Court of Appeals, it is well settled that a state tax comports with the Due Process Clause if "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S., at 444; see 1 R. Rotunda, J. Nowak, & J. Young, Treatise on Constitutional Law § 13.2, p. 669 (1986). In light of the police, fire, and other services provided to Reynolds' imported tobacco by the North Carolina counties and cities, such a "fiscal relation" clearly exists in this case. Although Reynolds contends that goods located in customs-bonded warehouses are outside the taxing jurisdiction of the State because of their "in transit" status, for the reasons given above this argument no more succeeds in the due process context than it does when addressed to the Import-Export Clause analysis.

In No. 85–1021, the judgment of the Supreme Court of North Carolina is affirmed. The appeal in No. 85–1022 is dismissed for want of jurisdiction.

It is so ordered.

COLORADO *v.* CONNELLY

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 85–660. Argued October 8, 1986—Decided December 10, 1986

Respondent approached a Denver police officer and stated that he had murdered someone and wanted to talk about it. The officer advised respondent of his *Miranda* rights, and respondent said that he understood those rights but still wanted to talk about the murder. Shortly thereafter, a detective arrived and again advised respondent of his rights. After respondent answered that he had come all the way from Boston to confess to the murder, he was taken to police headquarters. He then openly detailed his story to the police and subsequently pointed out the exact location of the murder. He was held overnight, and the next day he became visibly disoriented during an interview with the public defender's office and was sent to a state hospital for evaluation. Interviews with a psychiatrist revealed that respondent was following the "voice of God" in confessing to the murder. On the basis of the psychiatrist's testimony that respondent suffered from a psychosis that interfered with his ability to make free and rational choices and, although not preventing him from understanding his rights, motivated his confession, the trial court suppressed respondent's initial statements and custodial confession because they were "involuntary," notwithstanding the fact that the police had done nothing wrong or coercive in securing the confession. The court also found that respondent's mental state vitiated his attempted waiver of the right to counsel and the privilege against self-incrimination. The Colorado Supreme Court affirmed, holding that the Federal Constitution requires a court to suppress a confession when the defendant's mental state, at the time he confessed, interfered with his "rational intellect" and his "free will," the very admission of the evidence in a court of law being sufficient state action to implicate the Due Process Clause of the Fourteenth Amendment. The court further held that respondent's mental condition precluded his ability to make a valid waiver of his *Miranda* rights and that the State had not met its burden of proving a waiver by "clear and convincing evidence."

Held:

1. Coercive police activity is a necessary predicate to finding that a confession is not "voluntary" within the meaning of the Due Process Clause. Here, the taking of respondent's statements and their admission into evidence constituted no violation of that Clause. While a defendant's mental condition may be a "significant" factor in the "volun-

tariness" calculus, this does not justify a conclusion that his mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness." Pp. 163–167.

2. Whenever the State bears the burden of proof in a motion to suppress a statement allegedly obtained in violation of the *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence. *Lego* v. *Twomey*, 404 U. S. 477, reaffirmed. Thus, the Colorado Supreme Court erred in applying a "clear and convincing evidence" standard. That court also erred in its analysis of the question whether respondent had waived his *Miranda* rights. Notions of "free will" have no place in this area of constitutional law. Respondent's perception of coercion flowing from the "voice of God" is a matter to which the Federal Constitution does not speak. Pp. 167–171.

702 P. 2d 722, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, POWELL, O'CONNOR, and SCALIA, JJ., joined, and in all but Part III–A of which BLACKMUN, J., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 171. STEVENS, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 171. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 174.

Nathan B. Coats argued the cause for petitioner. With him on the briefs was *Norman S. Early, Jr.*

Andrew J. Pincus argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Frey*.

Thomas M. Van Cleave III argued the cause for respondent. With him on the brief were *David F. Vela*, *Robin Desmond*, and *Abelardo P. Bernal*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Colorado et al. by *Duane Woodard*, Attorney General of Colorado, *Charles B. Howe*, Deputy Attorney General, *Richard H. Forman*, Solicitor General, and *Eric Perryman*, Assistant Attorney General, *Charles A. Graddick*, Attorney General of Alabama, *John Van de Kamp*, Attorney General of California, *John J. Kelly*, Chief State's Attorney of Connecticut, *Charles M. Oberly*, Attorney General of Delaware, *Jim Smith*, Attorney General of Florida, *Richard Opper*, Attorney General of Guam, *Jim Jones*, Attor-

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case, the Supreme Court of Colorado held that the United States Constitution requires a court to suppress a confession when the mental state of the defendant, at the time he made the confession, interfered with his "rational intellect" and his "free will." Because this decision seemed to conflict with prior holdings of this Court, we granted certiorari. 474 U. S. 1050 (1986). We conclude that the admissibility of this kind of statement is governed by state rules of evidence, rather than by our previous decisions regarding coerced confessions and *Miranda* waivers. We therefore reverse.

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ney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Edwin L. Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Mike Greely*, Attorney General of Montana, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *W. Cary Edwards*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Michael Turpen*, Attorney General of Oklahoma, *David Frohnmayer*, Attorney General of Oregon, *Travis Medlock*, Attorney General of South Carolina, *W. J. Michael Cody*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *David L. Wilkinson*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Leroy A. Mercer*, Attorney General of the Virgin Islands, *Mary Sue Terry*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Archie G. McClintock*, Attorney General of Wyoming; and for the American Psychological Association by *Bruce J. Ennis, Jr.*, and *Donald N. Bersoff*.

Michael L. Perlin filed a brief for the Coalition for the Fundamental Rights and Equality of Ex-patients as *amicus curiae* urging affirmance.

Fred E. Inbau, *Wayne W. Schmidt*, *James P. Manak*, *Jack E. Yelverton*, *David Crump*, *Daniel B. Hales*, and *William C. Summers* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae*.

I

On August 18, 1983, Officer Patrick Anderson of the Denver Police Department was in uniform, working in an off-duty capacity in downtown Denver. Respondent Francis Connelly approached Officer Anderson and, without any prompting, stated that he had murdered someone and wanted to talk about it. Anderson immediately advised respondent that he had the right to remain silent, that anything he said could be used against him in court, and that he had the right to an attorney prior to any police questioning. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Respondent stated that he understood these rights but he still wanted to talk about the murder. Understandably bewildered by this confession, Officer Anderson asked respondent several questions. Connelly denied that he had been drinking, denied that he had been taking any drugs, and stated that, in the past, he had been a patient in several mental hospitals. Officer Anderson again told Connelly that he was under no obligation to say anything. Connelly replied that it was "all right," and that he would talk to Officer Anderson because his conscience had been bothering him. To Officer Anderson, respondent appeared to understand fully the nature of his acts. Tr. 19.

Shortly thereafter, Homicide Detective Stephen Antuna arrived. Respondent was again advised of his rights, and Detective Antuna asked him "what he had on his mind." *Id.*, at 24. Respondent answered that he had come all the way from Boston to confess to the murder of Mary Ann Junta, a young girl whom he had killed in Denver sometime during November 1982. Respondent was taken to police headquarters, and a search of police records revealed that the body of an unidentified female had been found in April 1983. Respondent openly detailed his story to Detective Antuna and Sergeant Thomas Haney, and readily agreed to take the officers to the scene of the killing. Under Connelly's sole direction, the two officers and respondent pro-

ceeded in a police vehicle to the location of the crime. Respondent pointed out the exact location of the murder. Throughout this episode, Detective Antuna perceived no indication whatsoever that respondent was suffering from any kind of mental illness. *Id.*, at 33–34.

Respondent was held overnight. During an interview with the public defender's office the following morning, he became visibly disoriented. He began giving confused answers to questions, and for the first time, stated that "voices" had told him to come to Denver and that he had followed the directions of these voices in confessing. *Id.*, at 42. Respondent was sent to a state hospital for evaluation. He was initially found incompetent to assist in his own defense. By March 1984, however, the doctors evaluating respondent determined that he was competent to proceed to trial.

At a preliminary hearing, respondent moved to suppress all of his statements. Dr. Jeffrey Metzner, a psychiatrist employed by the state hospital, testified that respondent was suffering from chronic schizophrenia and was in a psychotic state at least as of August 17, 1983, the day before he confessed. Metzner's interviews with respondent revealed that respondent was following the "voice of God." This voice instructed respondent to withdraw money from the bank, to buy an airplane ticket, and to fly from Boston to Denver. When respondent arrived from Boston, God's voice became stronger and told respondent either to confess to the killing or to commit suicide. Reluctantly following the command of the voices, respondent approached Officer Anderson and confessed.

Dr. Metzner testified that, in his expert opinion, respondent was experiencing "command hallucinations." *Id.*, at 56. This condition interfered with respondent's "volitional abilities; that is, his ability to make free and rational choices." *Ibid.* Dr. Metzner further testified that Connelly's illness did not significantly impair his cognitive abilities. Thus, respondent understood the rights he had when Officer Ander-

son and Detective Antuna advised him that he need not speak. *Id.*, at 56–57. Dr. Metzner admitted that the "voices" could in reality be Connelly's interpretation of his own guilt, but explained that in his opinion, Connelly's psychosis motivated his confession.

On the basis of this evidence the Colorado trial court decided that respondent's statements must be suppressed because they were "involuntary." Relying on our decisions in *Townsend* v. *Sain*, 372 U. S. 293 (1963), and *Culombe* v. *Connecticut*, 367 U. S. 568 (1961), the court ruled that a confession is admissible only if it is a product of the defendant's rational intellect and "free will." Tr. 88. Although the court found that the police had done nothing wrong or coercive in securing respondent's confession, Connelly's illness destroyed his volition and compelled him to confess. *Id.*, at 89. The trial court also found that Connelly's mental state vitiated his attempted waiver of the right to counsel and the privilege against compulsory self-incrimination. Accordingly, respondent's initial statements and his custodial confession were suppressed. *Id.*, at 90.

The Colorado Supreme Court affirmed. 702 P. 2d 722 (1985). In that court's view, the proper test for admissibility is whether the statements are "the product of a rational intellect and a free will." *Id.*, at 728. Indeed, "the absence of police coercion or duress does not foreclose a finding of involuntariness. One's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure." *Ibid.* The court found that the very admission of the evidence in a court of law was sufficient state action to implicate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The evidence fully supported the conclusion that respondent's initial statement was not the product of a rational intellect and a free will. The court then considered respondent's attempted waiver of his constitutional rights and found that respondent's mental condition precluded his

ability to make a valid waiver. *Id.*, at 729. The Colorado Supreme Court thus affirmed the trial court's decision to suppress all of Connelly's statements.

II

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." Just last Term, in *Miller* v. *Fenton*, 474 U. S. 104, 109 (1985), we held that by virtue of the Due Process Clause "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned." See also *Moran* v. *Burbine*, 475 U. S. 412, 432–434 (1986).

Indeed, coercive government misconduct was the catalyst for this Court's seminal confession case, *Brown* v. *Mississippi*, 297 U. S. 278 (1936). In that case, police officers extracted confessions from the accused through brutal torture. The Court had little difficulty concluding that even though the Fifth Amendment did not at that time apply to the States, the actions of the police were "revolting to the sense of justice." *Id.*, at 286. The Court has retained this due process focus, even after holding, in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), that the Fifth Amendment privilege against compulsory self-incrimination applies to the States. See *Miller* v. *Fenton*, *supra*, at 109–110.

Thus the cases considered by this Court over the 50 years since *Brown* v. *Mississippi* have focused upon the crucial element of police overreaching.[1] While each confession case

[1] *E. g.*, *Mincey* v. *Arizona*, 437 U. S. 385 (1978) (defendant subjected to 4-hour interrogation while incapacitated and sedated in intensive-care unit); *Greenwald* v. *Wisconsin*, 390 U. S. 519 (1968) (defendant, on medication, interrogated for over 18 hours without food or sleep); *Beecher* v. *Alabama*, 389 U. S. 35 (1967) (police officers held gun to the head of wounded confessant to extract confession); *Davis* v. *North Carolina*, 384 U. S. 737 (1966) (16 days of incommunicado interrogation in closed cell without windows, limited food, and coercive tactics); *Reck* v. *Pate*, 367 U. S. 433 (1961)

has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.[2] Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. See *Spano* v. *New York*, 360 U. S. 315 (1959). But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."

Respondent relies on *Blackburn* v. *Alabama*, 361 U. S. 199 (1960), and *Townsend* v. *Sain*, 372 U. S. 293 (1963), for the proposition that the "deficient mental condition of the defendants in those cases was sufficient to render their confessions involuntary." Brief for Respondent 20. But respondent's reading of *Blackburn* and *Townsend* ignores the integral element of police overreaching present in both cases. In *Blackburn*, the Court found that the petitioner was probably insane at the time of his confession and the police learned during the interrogation that he had a history of mental prob-

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(defendant held for four days with inadequate food and medical attention until confession obtained); *Culombe* v. *Connecticut*, 367 U. S. 568 (1961) (defendant held for five days of repeated questioning during which police employed coercive tactics); *Payne* v. *Arkansas*, 356 U. S. 560 (1958) (defendant held incommunicado for three days with little food; confession obtained when officers informed defendant that Chief of Police was preparing to admit lynch mob into jail); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944) (defendant questioned by relays of officers for 36 hours without an opportunity for sleep).

[2] Even where there is causal connection between police misconduct and a defendant's confession, it does not automatically follow that there has been a violation of the Due Process Clause. See, *e. g.*, *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969).

lems. The police exploited this weakness with coercive tactics: "the eight- to nine-hour sustained interrogation in a tiny room which was upon occasion literally filled with police officers; the absence of Blackburn's friends, relatives, or legal counsel; [and] the composition of the confession by the Deputy Sheriff rather than by Blackburn." 361 U. S., at 207–208. These tactics supported a finding that the confession was involuntary. Indeed, the Court specifically condemned police activity that "wrings a confession out of an accused against his will." *Id.*, at 206–207. *Townsend* presented a similar instance of police wrongdoing. In that case, a police physician had given Townsend a drug with truth-serum properties. 372 U. S., at 298–299. The subsequent confession, obtained by officers who knew that Townsend had been given drugs, was held involuntary. These two cases demonstrate that while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry.

Our "involuntary confession" jurisprudence is entirely consistent with the settled law requiring some sort of "state action" to support a claim of violation of the Due Process Clause of the Fourteenth Amendment. The Colorado trial court, of course, found that the police committed no wrongful acts, and that finding has been neither challenged by respondent nor disturbed by the Supreme Court of Colorado. The latter court, however, concluded that sufficient state action was present by virtue of the admission of the confession into evidence in a court of the State. 702 P. 2d, at 728–729.

The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other. The flaw in respondent's constitutional argument is that it would expand our previous line of "voluntariness" cases into a far-ranging requirement that courts must divine a defendant's

motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision.

The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause. See *Walter* v. *United States*, 447 U. S. 649, 656 (1980); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 487–488 (1971); *Burdeau* v. *McDowell*, 256 U. S. 465, 476 (1921). We have also observed that "[j]urists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." *United States* v. *Janis*, 428 U. S. 433, 448–449 (1976). See also *United States* v. *Havens*, 446 U. S. 620, 627 (1980); *United States* v. *Calandra*, 414 U. S. 338 (1974). Moreover, suppressing respondent's statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. See *United States* v. *Leon*, 468 U. S. 897, 906–913 (1984). Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained.

We have previously cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries . . . ." *Lego* v. *Twomey*, 404 U. S. 477, 488–489 (1972). We abide by that counsel now. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986), and while we have previously held that exclusion of evidence may be necessary to protect constitutional guarantees, both the necessity for the collateral inquiry and the exclusion of evidence deflect a criminal trial from its basic purpose. Respondent would now have us re-

quire sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the State. We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, see, *e. g.*, Fed. Rule Evid. 601, and not by the Due Process Clause of the Fourteenth Amendment. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba* v. *California*, 314 U. S. 219, 236 (1941).

We hold that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment. We also conclude that the taking of respondent's statements, and their admission into evidence, constitute no violation of that Clause.

III

A

The Supreme Court of Colorado went on to affirm the trial court's ruling that respondent's later statements made while in custody should be suppressed because respondent had not waived his right to consult an attorney and his right to remain silent. That court held that the State must bear its burden of proving waiver of these *Miranda* rights by "clear and convincing evidence." 702 P. 2d, at 729. Although we have stated in passing that the State bears a "heavy" burden in proving waiver, *Tague* v. *Louisiana*, 444 U. S. 469 (1980) *(per curiam); North Carolina* v. *Butler* 441 U. S. 369, 373 (1979); *Miranda* v. *Arizona*, 384 U. S., at 475, we have never

held that the "clear and convincing evidence" standard is the appropriate one.

In *Lego* v. *Twomey*, *supra*, this Court upheld a procedure in which the State established the voluntariness of a confession by no more than a preponderance of the evidence. We upheld it for two reasons. First, the voluntariness determination has nothing to do with the reliability of jury verdicts; rather, it is designed to determine the presence of police coercion. Thus, voluntariness is irrelevant to the presence or absence of the elements of a crime, which must be proved beyond a reasonable doubt. See *In re Winship*, 397 U. S. 358 (1970). Second, we rejected Lego's assertion that a high burden of proof was required to serve the values protected by the exclusionary rule. We surveyed the various reasons for excluding evidence, including a violation of the requirements of *Miranda* v. *Arizona*, *supra*, and we stated that "[i]n each instance, and without regard to its probative value, evidence is kept from the trier of guilt or innocence for reasons wholly apart from enhancing the reliability of verdicts." *Lego* v. *Twomey*, 404 U. S., at 488. Moreover, we rejected the argument that "the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond a reasonable doubt." *Ibid.* Indeed, the Court found that "no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence." *Ibid.*

We now reaffirm our holding in *Lego:* Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence. See *Nix* v. *Williams*, 467 U. S. 431, 444, and n. 5 (1984); *United States* v. *Matlock*, 415 U. S. 164, 178, n. 14 (1974) ("[T]he controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence . . .").

Cf. *Moore* v. *Michigan*, 355 U. S. 155, 161–162 (1957). If, as we held in *Lego* v. *Twomey*, *supra*, the voluntariness of a confession need be established only by a preponderance of the evidence, then a waiver of the auxiliary protections established in *Miranda* should require no higher burden of proof. "[E]xclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in . . . suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence." *Lego* v. *Twomey*, *supra*, at 489. See also *United States* v. *Leon*, 468 U. S., at 906–913.

B

We also think that the Supreme Court of Colorado was mistaken in its analysis of the question whether respondent had waived his *Miranda* rights in this case.[3] Of course, a waiver must at a minimum be "voluntary" to be effective against an accused. *Miranda*, *supra*, at 444, 476; *North Carolina* v. *Butler*, *supra*, at 373. The Supreme Court of Colorado in addressing this question relied on the testimony of the court-appointed psychiatrist to the effect that respondent was not capable of making a "free decision with respect to his constitutional right of silence . . . and his constitutional right to confer with a lawyer before talking to the police." 702 P. 2d, at 729.

We think that the Supreme Court of Colorado erred in importing into this area of constitutional law notions of "free will" that have no place there. There is obviously no reason to require more in the way of a "voluntariness" inquiry in the

[3] Petitioner conceded at oral argument that when Officer Anderson handcuffed respondent, the custody requirement of *Miranda* was satisfied. For purposes of our decision we accept that concession, and we similarly assume that the police officers "interrogated" respondent within the meaning of *Miranda*.

Miranda waiver context than in the Fourteenth Amendment confession context. The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. See *United States* v. *Washington*, 431 U. S. 181, 187 (1977); *Miranda*, *supra*, at 460. Indeed, the Fifth Amendment privilege is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion." *Oregon* v. *Elstad*, 470 U. S. 298, 305 (1985). The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on "free choice" in any broader sense of the word. See *Moran* v. *Burbine*, 475 U. S., at 421 ("[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. . . . [T]he record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements"); *Fare* v. *Michael C.*, 442 U. S. 707, 726–727 (1979) (The defendant was "not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit. . . . The officers did not intimidate or threaten respondent in any way. Their questioning was restrained and free from the abuses that so concerned the Court in *Miranda*").

Respondent urges this Court to adopt his "free will" rationale, and to find an attempted waiver invalid whenever the defendant feels compelled to waive his rights by reason of any compulsion, even if the compulsion does not flow from the police. But such a treatment of the waiver issue would "cut this Court's holding in *[Miranda]* completely loose from its own explicitly stated rationale." *Beckwith* v. *United States*, 425 U. S. 341, 345 (1976). *Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that. Respondent's perception of coercion flowing from the "voice of God," however important or significant such a

perception may be in other disciplines, is a matter to which the United States Constitution does not speak.

IV

The judgment of the Supreme Court of Colorado is accordingly reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.[4]

It is so ordered.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join Parts I, II, III–B, and IV of the Court's opinion and its judgment.

I refrain, however, from joining Part III–A of the opinion. Whatever may be the merits of the issue discussed there, which concerns the level of the State's burden of proof in showing that respondent had waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), that issue was neither raised nor briefed by the parties, and, in my view, it is not necessary to the decision.

JUSTICE STEVENS, concurring in the judgment in part and dissenting in part.

Respondent made incriminatory statements both before and after he was handcuffed and taken into custody. The only question presented by the Colorado District Attorney in his certiorari petition concerned the admissibility of respondent's precustodial statements. Pet. for Cert. i, 14–15.[1] I

[4] It is possible to read the opinion of the Supreme Court of Colorado as finding respondent's *Miranda* waiver invalid on other grounds. Even if that is the case, however, we nonetheless reverse the judgment in its entirety because of our belief that the Supreme Court of Colorado's analysis was influenced by its mistaken view of "voluntariness" in the constitutional sense. Reconsideration of other issues, not inconsistent with our opinion, is of course open to the Supreme Court of Colorado on remand.

[1] The petition states: "[Respondent's] later confession, which involves a *Miranda* issue, is not an issue in this petition." Pet. for Cert. 15.

agree with the State of Colorado that the United States Constitution does not require suppression of those statements, but in reaching that conclusion, unlike the Court, I am perfectly willing to accept the state trial court's finding that the statements were involuntary.

The state trial court found that, in view of the "overwhelming evidence presented by the Defense," the prosecution did not meet its burden of demonstrating that respondent's initial statements to Officer Anderson were voluntary. App. 47–48. Nevertheless, in my opinion, the use of these involuntary precustodial statements does not violate the Fifth Amendment because they were not the product of state compulsion. Although they may well be so unreliable that they could not support a conviction, at this stage of the proceeding I could not say that they have no probative force whatever. The fact that the statements were involuntary—just as the product of Lady Macbeth's nightmare was involuntary[2]—does not mean that their use for whatever evidentiary value they may have is fundamentally unfair or a denial of due process.

The postcustodial statements raise an entirely distinct question. When the officer whom respondent approached elected to handcuff him and to take him into custody, the police assumed a fundamentally different relationship with him. Prior to that moment, the police had no duty to give respondent *Miranda* warnings and had every right to continue their exploratory conversation with him.[3] Once the custodial relationship was established, however, the questioning as-

[2] "What, will these hands ne'er be clean?

. . . . . .

"Here's the smell of the blood still: all the perfumes of Arabia will not sweeten this little hand." W. Shakespeare, Macbeth, Act V, scene 1, lines 41, 47.

Lady Macbeth's "eyes are open," "but their sense is shut." *Id.*, at line 23.

[3] See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 247 (1973) ("*Miranda*, of course, did not reach investigative questioning of a person not in custody . . .").

sumed a presumptively coercive character. *Miranda* v. *Arizona*, 384 U. S. 436, 467 (1966). In my opinion the questioning could not thereafter go forward in the absence of a valid waiver of respondent's constitutional rights unless he was provided with counsel. Since it is undisputed that respondent was not then competent to stand trial, I would also conclude that he was not competent to waive his constitutional right to remain silent.[4]

The Court seems to believe that a waiver can be voluntary even if it is not the product of an exercise of the defendant's "'free will.'" *Ante*, at 169. The Court's position is not only incomprehensible to me; it is also foreclosed by the Court's recent pronouncement in *Moran* v. *Burbine*, 475 U. S. 412, 421 (1986), that "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice . . . ."[5] Because respondent's waiver was not voluntary in that sense, his custodial interrogation was presumptively coercive. The Colorado Supreme Court was unquestionably correct in concluding that his post-custodial incriminatory statements were inadmissible.

Accordingly, I concur in the judgment insofar as it applies to respondent's precustodial statements but respectfully dis-

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[4] The trial court found:

"Here, in the Court's estimation, there's no question that the Defendant did not exercise free will in choosing to talk to the police. He exercised a choice both *[sic]* of which were mandated by auditory hallucination, had no basis in reality, and were the product of a psychotic break with reality. The Defendant at the time of the confession had absolutely in the Court's estimation no volition or choice to make. He was compelled by his illness to do that which he did, and he did so in a manner which is not unusual for people who suffer schizophrenia." App. 47.

[5] The Court relies on the further statement in *Moran* v. *Burbine*, 475 U. S., at 421, that the waiver must result from "free and deliberate choice rather than intimidation, coercion, or deception . . . ." *Ante*, at 170. Obviously this dichotomy does not exhaust the possibilities; the mere absence of police misconduct does not establish that the suspect has made a free and deliberate choice when the suspect is not competent to stand trial.

sent from the Court's disposition of the question that was not presented by the certiorari petition.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today the Court denies Mr. Connelly his fundamental right to make a vital choice with a sane mind, involving a determination that could allow the State to deprive him of liberty or even life. This holding is unprecedented: "Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane . . . ." *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960). Because I believe that the use of a mentally ill person's involuntary confession is antithetical to the notion of fundamental fairness embodied in the Due Process Clause, I dissent.

I

The respondent's seriously impaired mental condition is clear on the record of this case. At the time of his confession, Mr. Connelly suffered from a "longstanding severe mental disorder," diagnosed as chronic paranoid schizophrenia. 1 Record 16. He had been hospitalized for psychiatric reasons five times prior to his confession; his longest hospitalization lasted for seven months. *Id.*, at 12. Mr. Connelly heard imaginary voices and saw nonexistent objects. Tr. 56. He believed that his father was God, and that he was a reincarnation of Jesus. 1 Record 15.

At the time of his confession, Mr. Connelly's mental problems included "grandiose and delusional thinking." *Id.*, at 16. He had a known history of "thought withdrawal and insertion." *Id.*, at 14. Although physicians had treated Mr. Connelly "with a wide variety of medications in the past including antipsychotic medications," he had not taken any antipsychotic medications for at least six months prior to his confession. *Id.*, at 12. Following his arrest, Mr. Connelly initially was found incompetent to stand trial because the

court-appointed psychiatrist, Dr. Metzner, "wasn't very confident that he could consistently relate accurate information." Tr. 68. Dr. Metzner testified that Mr. Connelly was unable "to make free and rational choices" due to auditory hallucinations: "[W]hen he was read his *Miranda* rights, he probably had the capacity to know that he was being read his *Miranda* rights [but] he wasn't able to use that information because of the command hallucinations that he had experienced." *Id.*, at 56–57. He achieved competency to stand trial only after six months of hospitalization and treatment with antipsychotic and sedative medications. *Id.*, at 68; 1 Record 16.

The state trial court found that the "overwhelming evidence presented by the Defense" indicated that the prosecution did not meet its burden of demonstrating by a preponderance of the evidence that the initial statement to Officer Anderson was voluntary. While the court found no police misconduct, it held:

> "[T]here's no question that the Defendant did not exercise free will in choosing to talk to the police. He exercised a choice both *[sic]* of which were mandated by auditory hallucination, had no basis in reality, and were the product of a psychotic break with reality. The Defendant at the time of the confession had absolutely in the Court's estimation no volition or choice to make." App. 47.

The trial court also held that the State had not shown by clear and convincing evidence that the defendant had waived his *Miranda* right to counsel and to self-incrimination "voluntarily, knowingly and intelligently." App. 48.

The Supreme Court of Colorado affirmed after evaluating "the totality of circumstances" surrounding the unsolicited confession and the waiver of *Miranda* rights. 702 P. 2d 722, 728 (1985).

II

The absence of police wrongdoing should not, by itself, determine the voluntariness of a confession by a mentally ill person. The requirement that a confession be voluntary reflects a recognition of the importance of free will and of reliability in determining the admissibility of a confession, and thus demands an inquiry into the totality of the circumstances surrounding the confession.

A

Today's decision restricts the application of the term "involuntary" to those confessions obtained by police coercion. Confessions by mentally ill individuals or by persons coerced by parties other than police officers are now considered "voluntary." The Court's failure to recognize all forms of involuntariness or coercion as antithetical to due process reflects a refusal to acknowledge free will as a value of constitutional consequence. But due process derives much of its meaning from a conception of fundamental fairness that emphasizes the right to make vital choices voluntarily: "The Fourteenth Amendment secures against state invasion . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will . . . ." *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964). This right requires vigilant protection if we are to safeguard the values of private conscience and human dignity.

This Court's assertion that we would be required "to establish a brand new constitutional right" to recognize the respondent's claim, *ante*, at 166, ignores 200 years of constitutional jurisprudence.[1] As we stated in *Culombe* v. *Connecticut*, 367 U. S. 568 (1961):

[1] Cf. *Bram* v. *United States*, 168 U. S. 532, 547–548 (1897) (reviewing the "rule [of law] in England at the time of the adoption of the Constitution and of the Fifth Amendment" and citing W. Hawkins, Pleas of the Crown (6th ed. 1787): "[a] confession, therefore, whether made upon an official examination or *in discourse with private persons*, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear,

> "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? . . . The line of distinction is that at which governing self-direction is lost *and compulsion, of whatever nature or however infused,* propels or helps to propel the confession." *Id.*, at 602 (emphasis added).

A true commitment to fundamental fairness requires that the inquiry be "not whether the conduct of state officers in obtaining the confession is shocking, but whether the confession was 'free and voluntary' . . . ." *Malloy* v. *Hogan*, *supra*, at 7.

We have never confined our focus to police coercion, because the value of freedom of will has demanded a broader inquiry. See *Blackburn* v. *Alabama*, 361 U. S., at 206–207. The confession cases decided by this Court over the 50 years since *Brown* v. *Mississippi*, 297 U. S. 278 (1936), have focused upon both police overreaching and free will. While it is true that police overreaching has been an element of every confession case to date, see *ante*, at 163–164, n. 1, it is also true that in every case the Court has made clear that ensuring that a confession is a product of free will is an independent concern.[2] The fact that involuntary confessions

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however slightly the emotions may be implanted, . . . is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction") (emphasis added).

[2] *E. g.*, *Mincey* v. *Arizona*, 437 U. S. 385, 398 (1978) ("It is hard to imagine a situation less conducive to the exercise of 'a rational intellect and a free will' than Mincey's"); *Greenwald* v. *Wisconsin*, 390 U. S. 519, 521 (1968) ("Considering the totality of these circumstances, we do not think it credible that petitioner's statements were the product of his free and rational choice"); *Beecher* v. *Alabama*, 389 U. S. 35, 37 (1967) ("Still in a 'kind of slumber' from his last morphine injection, feverish, and in intense pain, the petitioner signed the written confessions thus prepared for him"); *Davis* v. *North Carolina*, 384 U. S. 737, 742 (1966) ("His level of intelli-

have always been excluded in part because of police overreaching signifies only that this is a case of first impression. Until today, we have never upheld the admission of a confession that does not reflect the exercise of free will.

The Court cites *Townsend* v. *Sain*, 372 U. S. 293 (1963), and *Blackburn* in support of its view that police wrongdoing should be the central focus of inquiry. In *Townsend*, we overturned a murder conviction because the defendant's conviction was determined to be involuntary. The defendant suffered from stomach pains induced by heroin withdrawal. The police properly contacted a physician who administered medications alleviating the withdrawal symptoms. The defendant then confessed. 372 U. S., at 298. Although the physician denied that he purposely administered "truth serum," there was an indication that the medications could have had such a side effect upon a narcotic addict. *Id.*, at 302.

The *Townsend* Court examined "many relevant circumstances": "Among these are [the defendant's] lack of counsel at the time, his drug addiction, the fact that he was a 'near mental defective,' and his youth and inexperience." *Id.*, at 308, n. 4. According to today's Court, the police wrongdoing in *Townsend* was that the police physician had allegedly

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gence is such that it prompted the comment by the court below, even while deciding against him on his claim of involuntariness, that there is a moral question whether a person of Davis' mentality should be executed"); *Reck* v. *Pate*, 367 U. S. 433, 440 (1961) ("If [a defendant's will was overborne], the confession cannot be deemed 'the product of a rational intellect and a free will' "); *Culombe* v. *Connecticut*, 367 U. S. 568, 583 (1961) ("[A]n extra-judicial confession, if it was to be offered in evidence against a man, must be the product of his own free choice"); *Payne* v. *Arkansas*, 356 U. S. 560, 567 (1958) (footnotes omitted) ("It seems obvious from the *totality* of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice' "); *Ashcraft* v. *Tennessee*, 322 U. S. 143, 147 (1944) ("He was induced by the fear of violence at the hands of a mob and by fear of the officers").

given the defendant a drug with truth-serum properties, and that the confession was obtained by officers who knew that the defendant had been given drugs. *Ante*, at 165. But, in fact, "the police . . . did not know what [medications] the doctor had given [the defendant]." 372 U. S., at 299. And the *Townsend* Court expressly states that police wrongdoing was not an essential factor:

> "It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a 'truth serum,' if these properties exist. Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible. The Court has usually so stated the test." *Id.*, at 308 (footnote omitted; emphasis in original).

Furthermore, in prescient refutation of this Court's "police wrongdoing" theory, the *Townsend* Court analyzed *Blackburn*, the other case relied upon by this Court to "demonstrate" that police wrongdoing was a more important factor than the defendant's state of mind. The Court in *Townsend* stated:

> "[I]n *Blackburn* v. *Alabama*, 361 U. S. 199, we held *irrelevant* the absence of evidence of improper purpose on the part of the questioning officers. There the evidence indicated that the interrogating officers thought the defendant sane when he confessed, but we judged the confession inadmissible because the probability was that the defendant was *in fact* insane at the time." 372 U. S., at 309 (emphasis added).

Thus the *Townsend* Court interpreted *Blackburn* as a case involving a confession by a mentally ill defendant in which the police harbored no improper purpose.

This Court abandons this precedent in favor of the view that only confessions rendered involuntary by some state action are inadmissible, and that the only relevant form of state

action is police conduct. But even if state action is required, police overreaching is not its only relevant form. The Colorado Supreme Court held that the trial court's admission of the involuntary confession into evidence is also state action. The state court's analysis is consistent with *Brown* v. *Mississippi*, 297 U. S. 278 (1936), on which this Court so heavily relies. *Brown*, a case involving the use of confessions at trial, makes clear that "[t]he due process clause requires 'that state action, *whether through one agency or another*, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Id.*, at 286 (emphasis added), citing *Hebert* v. *Louisiana*, 272 U. S. 312, 316 (1926). Police conduct constitutes but one form of state action. "The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system." *Harris* v. *New York*, 401 U. S. 222, 231 (1971) (BRENNAN, J., dissenting).[3]

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[3] Even if police knowledge of the defendant's insanity is required to exclude an involuntary confession, the record supports a finding of police knowledge in this case. The Court accepts the trial court's finding of no police wrongdoing since, in the trial judge's view, none of the police officers knew that Mr. Connelly was insane. Tr. 83–84. After plenary review of the record, see *Miller* v. *Fenton*, 474 U. S. 104, 115 (1985), I conclude that this finding is clearly erroneous.

When the defendant confessed to Officer Anderson, the officer's first thought was that Mr. Connelly was a "crackpot." Tr. 8. Today's Court describes Officer Anderson as "[u]nderstandably bewildered." *Ante*, at 160. After giving *Miranda* warnings, the officer questioned the defendant about whether he used drugs or alcohol. He also asked Mr. Connelly if he had been treated for any mental disorders, and the defendant responded that he had been treated in five different mental hospitals. Tr. 14, 17. While this Court concludes that "Detective Antuna perceived no indication whatsoever that respondent was suffering from any kind of mental illness," *ante*, at 161, the record indicates that Officer Anderson informed the detective about the defendant's five hospitalizations in mental institutions. Tr. 18. Thus, even under this Court's test requiring police wrongdoing, the record indicates that the officers here had sufficient knowledge about the defendant's mental incapacity to render the confession "involuntary."

The only logical "flaw" which the Court detects in this argument is that it would require courts to "divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision." *Ante*, at 165. Such a criticism, however, ignores the fact that we have traditionally examined the totality of the circumstances, including the motivation and competence of the defendant, in determining whether a confession is voluntary. Even today's Court admits that "as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." *Ante*, at 164. The Court's holding that involuntary confessions are only those procured through police misconduct is thus inconsistent with the Court's historical insistence that only confessions reflecting an exercise of free will be admitted into evidence.

B

Since the Court redefines voluntary confessions to include confessions by mentally ill individuals, the reliability of these confessions becomes a central concern. A concern for reliability is inherent in our criminal justice system, which relies upon accusatorial rather than inquisitorial practices. While an inquisitorial system prefers obtaining confessions from criminal defendants, an accusatorial system must place its faith in determinations of "guilt by evidence independently and freely secured." *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961). In *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), we justified our reliance upon accusatorial practices:

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Id.*, at 488–489 (footnotes omitted).

Our interpretation of the Due Process Clause has been shaped by this preference for accusatorial practices, see *Miller* v. *Fenton*, 474 U. S. 104, 109–110 (1985); *Malloy* v. *Hogan*, 378 U. S., at 7; *Watts* v. *Indiana*, 338 U. S. 49, 54 (1949), and by a concern for reliability, see *Barefoot* v. *Estelle*, 463 U. S. 880, 925 (1983) (BLACKMUN, J., dissenting); *Foster* v. *California*, 394 U. S. 440, 442 (1969).

Our distrust for reliance on confessions is due, in part, to their decisive impact upon the adversarial process. Triers of fact accord confessions such heavy weight in their determinations that "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained." E. Cleary, McCormick on Evidence 316 (2d ed. 1972); see also *Miranda* v. *Arizona*, 384 U. S. 436, 466 (1966); *Mapp* v. *Ohio*, 367 U. S. 643, 685 (1961). No other class of evidence is so profoundly prejudicial. See Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 Stan. L. Rev. 271, 293 (1975). "Thus the decision to confess before trial amounts in effect to a waiver of the right to require the state at trial to meet its heavy burden of proof." Cleary, *supra*, at 316.

Because the admission of a confession so strongly tips the balance against the defendant in the adversarial process, we must be especially careful about a confession's reliability. We have to date not required a finding of reliability for involuntary confessions only because *all* such confessions have been excluded upon a finding of involuntariness, regardless of reliability. See *Jackson* v. *Denno*, 378 U. S. 368, 383–386 (1964).[4] The Court's adoption today of a restrictive definition of an "involuntary" confession will require heightened scrutiny of a confession's reliability.

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[4] Prior to establishing this rule excluding all involuntary confessions, we held the view that the Fifth Amendment, at bottom, served as "a guarantee against conviction on inherently untrustworthy evidence." *Stein* v. *New York*, 346 U. S. 156, 192 (1953).

The instant case starkly highlights the danger of admitting a confession by a person with a severe mental illness. The trial court made no findings concerning the reliability of Mr. Connelly's involuntary confession, since it believed that the confession was excludable on the basis of involuntariness. However, the overwhelming evidence in the record points to the unreliability of Mr. Connelly's delusional mind. Mr. Connelly was found incompetent to stand trial because he was unable to relate accurate information, and the court-appointed psychiatrist indicated that Mr. Connelly was actively hallucinating and exhibited delusional thinking at the time of his confession. See *supra*, at 174. The Court, in fact, concedes that "[a] statement rendered by one in the condition of respondent might be proved to be quite unreliable . . . ." *Ante*, at 167.

Moreover, the record is barren of any corroboration of the mentally ill defendant's confession. No physical evidence links the defendant to the alleged crime. Police did not identify the alleged victim's body as the woman named by the defendant. Mr. Connelly identified the alleged scene of the crime, but it has not been verified that the unidentified body was found there or that a crime actually occurred there. There is not a shred of competent evidence in this record linking the defendant to the charged homicide. There is only Mr. Connelly's confession.

Minimum standards of due process should require that the trial court find substantial indicia of reliability, on the basis of evidence extrinsic to the confession itself, before admitting the confession of a mentally ill person into evidence. I would require the trial court to make such a finding on remand. To hold otherwise allows the State to imprison and possibly to execute a mentally ill defendant based solely upon an inherently unreliable confession.

III

This Court inappropriately reaches out to address two *Miranda* issues not raised by the prosecutor in his petition

for certiorari: (1) the burden of proof upon the government in establishing the voluntariness of *Miranda* rights, and (2) the effect of mental illness on the waiver of those rights in the absence of police misconduct.[5] I emphatically dissent from the Court's holding that the government need prove waiver by only a preponderance of the evidence, and from its conclusion that a waiver is automatically voluntary in the absence of police coercion.

A

In holding that the government need only prove the voluntariness of the waiver of *Miranda* rights by a preponderance of the evidence, the Court ignores the explicit command of *Miranda:*

> "If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy* burden rests on the government to demonstrate that the defend-

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[5] In deciding to hear this case, this Court took "the unprecedented step of rewriting a prosecutor's certiorari petition for him, enabling him to seek reversal on a ground he did not present himself." *Colorado* v. *Connelly*, 474 U. S. 1050, 1051 (1986) (BRENNAN, J., dissenting from briefing order). The prosecutor expressly limited his petition to this Court to the issue of the suppression of the involuntary confession. Pet. for Cert. 15. Despite this, the Court directed the parties to brief the question of whether the defendant's mental condition rendered his waiver of *Miranda* rights ineffective.

In addition, the Court today decides yet another issue neither raised nor briefed by either party. It holds that the government may establish the defendant's voluntary waiver of his *Miranda* rights by only a preponderance of the evidence.

The Court also requires the state court to readdress a separate and independent basis for finding the waiver invalid. Quite apart from finding the *Miranda* waiver involuntary, the Colorado Supreme Court found that it was not an intelligent and knowing decision. Although unaffected by this Court's new analysis of the voluntariness requirement, the state court is forced to reconsider this independent justification for its decision. *Ante*, at 171, n. 4. Such actions reinforce the Court's "appearance of being not merely the champion, but actually an arm of the prosecution." 474 U. S., at 1052.

> ant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. This Court has always set *high* standards of proof for the waiver of constitutional rights, and we re-assert these standards as applied to in-custody interrogation." *Miranda* v. *Arizona*, 384 U. S., at 475 (emphasis added; citations omitted).

In recognition of the importance of the Due Process Clause and the Fifth Amendment, we always have characterized the State's burden of proof on a *Miranda* waiver as "great" and "heavy." See, *e. g.*, *Tague* v. *Louisiana*, 444 U. S. 469, 470–471 (1980); *North Carolina* v. *Butler*, 441 U. S. 369, 373 (1979); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 236 (1973). Furthermore, under the Sixth Amendment, we have required the prosecution to meet a clear and convincing standard in demonstrating that evidence is not tainted by the absence of counsel at police lineups. See *United States* v. *Wade*, 388 U. S. 218, 240 (1967). Imposing the weakest possible burden of proof for waiver of *Miranda*'s right to counsel plainly ignores this precedent.

The Court bases its holding on *Lego* v. *Twomey*, 404 U. S. 477 (1972). The four-Member *Lego* Court concluded that a confession obtained when the defendant was not in custody could be admitted into evidence if the prosecution proved its voluntariness by a preponderance of the evidence.[6] The *Lego* Court's rationale rested on two related premises. First, since *all* involuntary confessions were excluded, even if truthful, the voluntariness determination was not based on reliability. Thus the requirement of proof beyond reasonable doubt for every fact necessary to constitute the charged crime, *In re Winship*, 397 U. S. 358, 364 (1970), was not

[6] Contrary to this Court's assertion, nowhere does the *Lego* Court state that "the voluntariness determination . . . is designed to determine the presence of police coercion." *Ante*, at 168. See *Lego* v. *Twomey*. The *Lego* Court did not distinguish coercion by police from coercion exerted from other sources.

applicable, because the concern of the *Winship* Court was the reliability of verdicts. 404 U. S., at 482–486. Second, the four Justices constituting the majority in *Lego* rejected the petitioner's argument that proof beyond reasonable doubt would best serve the constitutional values that the exclusionary rule was meant to protect. The four again emphasized that reliability of evidence was not a concern since all involuntary confessions were excluded. It found no evidence that federal rights had suffered by imposing the weakest standard of proof for exclusionary rules. *Id.*, at 487–489.

I adhere to my *Lego* dissent. The constitutional ideal that involuntary confessions should never be admitted against the defendant in criminal cases deserves protection by the highest standard of proof—proof beyond a reasonable doubt. *Id.*, at 491. The lower standard of proof results "in the admission of more involuntary confessions than would be admitted were the prosecution required to meet a higher standard." *Id.*, at 493. "Compelled self-incrimination is so alien to the American sense of justice that I see no way that such a view could ever be justified." *Id.*, at 494.

But even if the four Justices in *Lego* were correct, their holding is irrelevant to this case. The presumption underlying the reasoning in *Lego* was that reliability was not an important concern because involuntary confessions were always excluded. Today the Court redefines voluntariness so that involuntary confessions that are not the result of police wrongdoing are no longer excluded under the voluntariness standard. My analysis in Part II–B shows that reliability should now become a major concern in the admission of such confessions. Since the reliability of verdicts is at stake, proof beyond a reasonable doubt constitutes the appropriate standard.[7]

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[7] Furthermore, *Lego* established only that proof beyond a reasonable doubt was an inappropriately high standard. The decision has been criticized for never demonstrating affirmatively that the choice of the preponderance-of-the-evidence standard was more appropriate than the

Finally, *Lego* involved a situation in which the defendant was not in custody. By contrast, a *Miranda* waiver is found while a defendant is in police custody. The coercive custodial interrogation atmosphere poses an increased danger of police overreaching. The police establish the isolated conditions of custody and can document the voluntary waiver of *Miranda* rights through disinterested witnesses or recordings. See *Miranda* v. *Arizona*, *supra*, at 475. It is therefore appropriate to place a higher burden of proof on the government in establishing a waiver of *Miranda* rights.

The ultimate irony is that, even accepting the preponderance of the evidence as the correct standard, the prosecution still failed to meet this burden of proof. The Colorado Supreme Court found that Dr. Metzner, the court-appointed psychiatrist and the only expert to testify, "clearly established" that Mr. Connelly "was incapable" of making a "free decision" respecting his *Miranda* rights. 702 P. 2d, at 729. Thus the prosecution failed—even by the modest standard imposed today—to prove that Mr. Connelly voluntarily waived his *Miranda* rights.

B

The Court imports its voluntariness analysis, which makes police coercion a requirement for a finding of involuntariness, into its evaluation of the waiver of *Miranda* rights. My reasoning in Part II–A, *supra*, at 176–181, applies *a fortiori* to involuntary confessions made in custody involving the waiver of constitutional rights. See also *Miranda* v. *Arizona*, *supra*, at 460. I will not repeat here what I said there.

I turn then to the second requirement, apart from the voluntariness requirement, that the State must satisfy to establish a waiver of *Miranda* rights. Besides being voluntary,

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use of the clear-and-convincing-evidence standard. See Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 Stan. L. Rev. 271, 278 (1975). Here the Colorado Supreme Court chose to apply the clear-and-convincing-evidence standard and the *Lego* analysis cannot justify rejection of this intermediate standard.

the waiver must be knowing and intelligent. See *Moran* v. *Burbine*, 475 U. S. 412, 421 (1986). We recently noted that "the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Ibid.* The two requirements are independent: "Only if the 'totality of the circumstances surrounding the interrogation' reveals *both* an uncoerced choice *and* the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Ibid.* (emphasis added).

Since the Colorado Supreme Court found that Mr. Connelly was "clearly" unable to make an "intelligent" decision, clearly its judgment should be affirmed. The Court reverses the entire judgment, however, without explaining how a "mistaken view of voluntariness" could "taint" this independent justification for suppressing the custodial confession, but leaving the Colorado Supreme Court free on remand to reconsider other issues, not inconsistent with the Court's opinion. Such would include, in my view, whether the requirement of a knowing and intelligent waiver was satisfied. See *ante*, at 171, n. 4. Moreover, on the remand, today's holding does not, of course, preclude a contrary resolution of this case based upon the State's separate interpretation of its own Constitution. See *South Dakota* v. *Opperman*, 428 U. S. 364, 396 (1976) (MARSHALL, J., dissenting).

I dissent.

Syllabus

MUNRO, SECRETARY OF STATE OF WASHINGTON *v.* SOCIALIST WORKERS PARTY ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–656. Argued October 7, 1986—Decided December 10, 1986

A Washington statute (§ 29.18.110) requires that a minor-party candidate for office receive at least 1% of all votes cast for that office in the State's primary election before the candidate's name will be placed on the general election ballot. Appellee Peoples qualified to be placed on the primary election ballot as the nominee of appellee Socialist Workers Party (Party) for United States Senator. At the primary, he received less than 1% of the total votes cast for the office, and, accordingly, his name was not placed on the general election ballot. Peoples, the Party, and appellee registered voters then brought an action in Federal District Court, alleging that § 29.18.110 violated their rights under the First and Fourteenth Amendments. The District Court denied relief, but the Court of Appeals reversed, holding that § 29.18.110, as applied to candidates for statewide offices, was unconstitutional.

Held: Section 29.18.110 is constitutional. Pp. 193–199.

(a) States have a right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot. *Jenness* v. *Fortson*, 403 U. S. 431; *American Party of Texas* v. *White*, 415 U. S. 767. Pp. 193–194.

(b) The fact that Washington's political history evidences no voter confusion from ballot overcrowding does not require invalidation of § 29.18.110. A State is not required to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidates as a predicate to imposing reasonable ballot access restrictions. In any event, the record in this case discloses that enactment of § 29.18.110 was, in fact, linked to the legislature's perception that the general election ballot was becoming cluttered with minor-party candidates who did not command significant voter support, and the State was clearly entitled to raise the ante for ballot access, to simplify the general election ballot, and to avoid the possibility of unrestrained factionalism at the general election. Pp. 194–196.

(c) The burdens imposed on appellees' First Amendment rights by § 29.18.110 are not too severe to be justified by the State's interest in restricting access to the general ballot. Pp. 196–197.

(d) The differences between requiring primary votes to qualify for a position on the general election ballot and requiring signatures on nominating petitions are not of constitutional dimension. Pp. 197–198.

(e) There is no merit to appellees' argument that since voter turnout at primary elections is generally lower than the turnout at general elections, § 29.18.110 has reduced the pool of potential supporters from which appellee Party candidates can secure 1% of the vote. The statute creates no impediment to voting at primary elections and does no more than require a candidate to show a "significant modicum" of voter support in primary elections. P. 198.

(f) Section 29.18.110 serves to promote the very First Amendment values that are threatened by overly burdensome ballot access restrictions. Washington's voters are not denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election. Pp. 198–199.

765 F. 2d 1417, reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, POWELL, STEVENS, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 200.

James M. Johnson, Senior Assistant Attorney General of Washington, argued the cause for appellant. With him on the briefs were *Kenneth O. Eikenberry*, Attorney General, *Edward B. Mackie*, Chief Deputy Attorney General, and *Timothy R. Malone*, Assistant Attorney General.

Daniel Hoyt Smith argued the cause and filed a brief for appellees.*

JUSTICE WHITE delivered the opinion of the Court.

The State of Washington requires that a minor-party candidate for partisan office receive at least 1% of all votes cast for that office in the State's primary election before the candidate's name will be placed on the general election ballot. The question for decision is whether this statutory require-

*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation et al. by *Jack D. Novik*, *Burt Neuborne* and *David J. Burman;* and for the Libertarian Party of Washington by *James J. Featherstone* and *Richard E. Gardiner*.

ment, as applied to candidates for statewide offices, violates the First and Fourteenth Amendments to the United States Constitution. The Court of Appeals for the Ninth Circuit declared the provision unconstitutional. 765 F. 2d 1417 (1985). We reverse.

In 1977, the State of Washington enacted amendments to its election laws, changing the manner in which candidates from minor political parties qualify for placement on the general election ballot. Before the amendments, a minor-party candidate did not participate in the State's primary elections, but rather sought his or her party's nomination at a party convention held on the same day as the primary election for "major" parties.[1] The convention-nominated, minor-party candidate secured a position on the general election ballot upon the filing of a certificate signed by at least 100 registered voters who had participated in the convention and who had not voted in the primary election.[2] The 1977 amendments retained the requirement that a minor-party candidate be nominated by convention,[3] but imposed the additional requirement that, as a precondition to general ballot access, the nominee for an office appear on the primary election ballot and receive at least 1% of all votes cast for that particular of-

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[1] Wash. Rev. Code § 29.24.020 (1976). A "major" political party was defined as "a political party of which at least one nominee received at least ten percent of the total vote cast at the last preceding state-wide general election . . . ." § 29.01.090(1). This section's 10% requirement was amended in 1977 to 5%. § 29.01.090. A "minor" political party is "a political organization other than a major political party." § 29.01.100.

[2] § 29.24.040.

[3] § 29.24.020. Section 29.24.030(1) provides:

"To be valid, a convention must:

"(1) Be attended by at least a number of individuals who are registered to vote in the election jurisdiction for which nominations are to be made, which number is equal to one for each ten thousand voters or portion thereof who voted in the last preceding presidential election held in the election jurisdiction or twenty-five such registered voters, whichever number is greater . . . ."

Appellees did not challenge this requirement in the courts below.

fice at the primary election. Wash. Rev. Code § 29.18.110 (1985).[4]

Washington conducts a "blanket primary" at which registered voters may vote for any candidate of their choice, irrespective of the candidates' political party affiliation.[5] A candidate seeking placement on the primary election ballot must declare his candidacy no earlier than the last Monday in July, and no later than the following Friday.[6] Minor-party nominating conventions are to be held on the Saturday preceding this filing period.[7] The primary election is held on the third Tuesday in September.[8]

The events giving rise to this action occurred in 1983, after the state legislature authorized a special primary election to be held on October 11, 1983, to fill a vacancy in the office of United States Senator. Appellee Dean Peoples qualified to be placed on the primary election ballot as the nominee of appellee Socialist Workers Party (Party). Also appearing on that ballot were 32 other candidates. At the primary, Mr. Peoples received approximately nine one-hundredths of one percent of the total votes cast for the office,[9] and, accordingly, the State did not place his name on the general election ballot.

Appellees (Peoples, the Party, and two registered voters) commenced this action in United States District Court, alleging that § 29.18.110 abridged their rights secured by the First

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[4] Section 29.18.110 provides:

"No name of a candidate for a partisan office shall appear on the general election ballot unless he receives a number of votes equal to at least one percent of the total number cast for all candidates for the position sought: *Provided*, That only the name of the candidate who receives a plurality of the votes cast for the candidates of his party for any office shall appear on the general election ballot."

[5] § 29.18.200.

[6] § 29.18.025.

[7] § 29.24.020.

[8] § 29.13.070.

[9] Mr. Peoples received 596 of the 681,690 votes cast in the primary.

and Fourteenth Amendments. The District Court entered judgment denying appellees relief, but the Court of Appeals for the Ninth Circuit reversed, holding that § 29.18.110, as applied to candidates for statewide offices, was unconstitutional. The State filed a timely appeal with this Court, and we noted probable jurisdiction. 474 U. S. 1049 (1986).

Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968), and may not survive scrutiny under the First and Fourteenth Amendments. In *Williams* v. *Rhodes*, for example, we held unconstitutional the election laws of Ohio insofar as in combination they made it virtually impossible for a new political party to be placed on the ballot, even if the party had hundreds of thousands of adherents. These associational rights, however, are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively. *Storer* v. *Brown*, 415 U. S. 724, 730 (1974).

While there is no "litmus-paper test" for deciding a case like this, *ibid.*, it is now clear that States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office. In *Jenness* v. *Fortson*, 403 U. S. 431 (1971), the Court unanimously rejected a challenge to Georgia's election statutes that required independent candidates and minor-party candidates, in order to be listed on the general election ballot, to submit petitions signed by at least 5% of the voters eligible to vote in the last election for the office in question. Primary elections were held only for those political organizations whose candidate received 20% or more of the vote at the last gubernatorial or Presidential election. The Court's opinion observed that "[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's can-

didate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Id.*, at 442. And, in *American Party of Texas* v. *White*, 415 U. S. 767 (1974), candidates of minor political parties in Texas were required to demonstrate support by persons numbering at least 1% of the total vote cast for Governor at the last preceding general election. Candidates could secure the requisite number of petition signatures at precinct nominating conventions and by supplemental petitions following the conventions. Voters signing these supplemental petitions had to swear under oath that they had not participated in another party's primary election or nominating process. In rejecting a First Amendment challenge to the 1% requirement, we asserted that the State's interest in preserving the integrity of the electoral process and in regulating the number of candidates on the ballot was compelling and reiterated the holding in *Jenness* that a State may require a preliminary showing of significant support before placing a candidate on the general election ballot. *American Party of Texas* v. *White*, *supra*, at 782, n. 14.

Jenness and *American Party* establish with unmistakable clarity that States have an "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot . . . ." *Anderson* v. *Celebrezze*, 460 U. S. 780, 788–789, n. 9 (1983). We reaffirm that principle today.

The Court of Appeals determined that Washington's interest in insuring that candidates had sufficient community support did not justify the enactment of §29.18.110 because "Washington's political history evidences no voter confusion from ballot overcrowding." 765 F. 2d, at 1420. We accept this historical fact, but it does not require invalidation of §29.18.110.

We have never required a State to make a particularized showing of the existence of voter confusion, ballot over-

crowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access. In *Jenness* v. *Fortson*, *supra*, we conducted no inquiry into the sufficiency and quantum of the data supporting the reasons for Georgia's 5% petition-signature requirement. In *American Party of Texas* v. *White*, *supra*, we upheld the 1% petition-signature requirement, asserting that the "State's admittedly vital interests are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support." *Id.*, at 782. And, in *Storer* v. *Brown*, *supra*, we upheld California's statutory provisions that denied ballot access to an independent candidate if the candidate had been affiliated with any political party within one year prior to the immediately preceding primary election. We recognized that California had a "compelling" interest in maintaining the integrity of its political processes, and that the disaffiliation requirement furthered this interest and was therefore valid, even though it was an absolute bar to attaining a ballot position. We asserted that "[i]t appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system." *Id.*, at 736. There is no indication that we held California to the burden of demonstrating empirically the objective effects on political stability that were produced by the 1-year disaffiliation requirement.

To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than re-

actively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

In any event, the record here suggests that revision of § 29.18.110 was, in fact, linked to the state legislature's perception that the general election ballot was becoming cluttered with candidates from minor parties who did not command significant voter support. In 1976, one year prior to revision of § 29.18.110, the largest number of minor political parties in Washington's history—12—appeared on the general election ballot. The record demonstrates that at least part of the legislative impetus for revision of § 29.18.110 was concern about minor parties having such easy access to Washington's general election ballot.[10]

The primary election in Washington, like its counterpart in California, is "an integral part of the entire election process . . . [that] functions to winnow out and finally reject all but the chosen candidates." *Storer* v. *Brown*, 415 U. S., at 735. We think that the State can properly reserve the general election ballot "for major struggles," *ibid.*, by conditioning access to that ballot on a showing of a modicum of voter support. In this respect, the fact that the State is willing to have a long and complicated ballot at the primary provides no measure of what it may require for access to the general election ballot. The State of Washington was clearly entitled to raise the ante for ballot access, to simplify the general election ballot, and to avoid the possibility of unrestrained factionalism at the general election. See *id.*, at 736.

Neither do we agree with the Court of Appeals and appellees that the burdens imposed on appellees' First Amendment rights by the 1977 amendments are far too severe to be justified by the State's interest in restricting access to the general ballot. Much is made of the fact that prior to 1977, virtually every minor-party candidate who sought general election ballot position so qualified, while since 1977 only 1

[10] Memorandum from the Office of the Secretary of State to the legislature's Conference Committee, App. A to Reply Brief for Appellant.

out of 12 minor-party candidates has appeared on that ballot. Such historical facts are relevant, but they prove very little in this case, other than the fact that § 29.18.110 does not provide an insuperable barrier to minor-party ballot access.[11] It is hardly a surprise that minor parties appeared on the general election ballot before § 29.18.110 was revised; for, until then, there were virtually no restrictions on access. Under our cases, however, Washington was not required to afford such automatic access and would have been entitled to insist on a more substantial showing of voter support. Comparing the actual experience before and after 1977 tells us nothing about how minor parties would have fared in those earlier years had Washington conditioned ballot access to the maximum extent permitted by the Constitution.

Appellees urge that this case differs substantially from our previous cases because requiring primary votes to qualify for a position on the general election ballot is qualitatively more restrictive than requiring signatures on a nominating petition. In effect, their submission would foreclose any use of the primary election to determine a minor party's qualification for the general ballot. We are unpersuaded, however, that the differences between the two mechanisms are of constitutional dimension. Because Washington provides a "blanket primary," minor-party candidates can campaign among the entire pool of registered voters. Effort and resources that would otherwise be directed at securing petition signatures can instead be channeled into campaigns to "get the vote out," foster candidate name recognition, and educate the electorate. To be sure, candidates must demonstrate, through their ability to secure votes at the primary election, that they enjoy a modicum of community support in order to

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[11] Section 29.18.110 apparently poses an insubstantial obstacle to minor-party candidates for nonstatewide offices and independent candidates for statewide offices. Since 1977, 36 out of 40 such minor-party candidates have qualified for the general election ballot and 4 out of 5 independent candidates for statewide office have so qualified.

advance to the general election. But requiring candidates to demonstrate such support is precisely what we have held States are permitted to do.

Appellees argue that voter turnout at primary elections is generally lower than the turnout at general elections, and therefore enactment of § 29.18.110 has reduced the pool of potential supporters from which Party candidates can secure 1% of the vote. We perceive no more force to this argument than we would with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election. Washington has created no impediment to voting at the primary elections; every supporter of the Party in the State is free to cast his or her ballot for the Party's candidates. As was the case in *Jenness* v. *Fortson*, 403 U. S. 431 (1971), "candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. . . ." *Id.*, at 438. States are not burdened with a constitutional imperative to reduce voter apathy or to "handicap" an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot. As we see it, Washington has done no more than to visit on a candidate a requirement to show a "significant modicum" of voter support, and it was entitled to require that showing in its primary elections.

We also observe that § 29.18.110 is more accommodating of First Amendment rights and values than were the statutes we upheld in *Jenness*, *American Party*, and *Storer*. Under each scheme analyzed in those cases, if a candidate failed to satisfy the qualifying criteria, the State's voters had no opportunity to cast a ballot for that candidate and the candidate had no ballot-connected campaign platform from which to espouse his or her views; the unsatisfied qualifying criteria served as an absolute bar to ballot access. Undeniably, such restrictions raise concerns of constitutional dimension, for

the "exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day . . . ." *Anderson* v. *Celebrezze*, 460 U. S., at 787–788. Here, however, Washington virtually guarantees what the parties challenging the Georgia, Texas, and California election laws so vigorously sought—candidate access to a statewide ballot. This is a significant difference. Washington has chosen a vehicle by which minor-party candidates must demonstrate voter support that serves to promote the very First Amendment values that are threatened by overly burdensome ballot access restrictions. It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election. It is true that voters must make choices as they vote at the primary, but there are no state-imposed obstacles impairing voters in the exercise of their choices. Washington simply has not substantially burdened the "availability of political opportunity." *Lubin* v. *Panish*, 415 U. S. 709, 716 (1974).

Jenness and *American Party* rejected challenges to ballot access restrictions that were based on a candidate's showing of voter support, notwithstanding the fact that the systems operated to foreclose a candidate's access to *any* statewide ballot. Here, because Washington affords a minor-party candidate easy access to the primary election ballot and the opportunity for the candidate to wage a ballot-connected campaign, we conclude that the magnitude of §29.18.110's effect on constitutional rights is slight when compared to the restrictions we upheld in *Jenness* and *American Party*. Accordingly, Washington did not violate the Constitution by denying appellee Peoples a position on the general election ballot on November 8, 1983.

The judgment of the Court of Appeals for the Ninth Circuit is therefore reversed.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Limitations on ballot access burden two fundamental rights: "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968). These fundamental rights are implicated most clearly where minor-party access to the ballot is restricted. As we noted in *Illinois Board of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 185 (1979), "[t]he States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation."

The minor party's often unconventional positions broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority, in some instances ultimately becoming majority positions. And its very existence provides an outlet for voters to express dissatisfaction with the candidates or platforms of the major parties. Notwithstanding the crucial role minor parties play in the American political arena, the Court holds today that the associational rights of minor parties and their supporters are not unduly burdened by a ballot access statute that, in practice, completely excludes minor parties from participating in statewide general elections.

I

The Court fails to articulate the level of scrutiny it applies in holding that the Washington 1% primary vote requirement is not an unconstitutional ballot access restriction. While it recognizes that "[r]estrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively . . . and may not survive scrutiny under the First and Fourteenth Amendments,"

ante, at 193, the Court fails to indicate how much impingement would be too much or how great the State's interest must be to limit ballot access to candidates who have demonstrated a particular level of popular support.

By contrast, the standard of review set forth in our prior decisions is clear: Whether viewed as a burden on the right to associate or as discrimination against minor parties, a provision that burdens minor-party access to the ballot must be necessary to further a compelling state interest, and must be narrowly tailored to achieve that goal. *Illinois Board of Elections* v. *Socialist Workers Party*, *supra*, at 184; *American Party of Texas* v. *White*, 415 U. S. 767, 780 (1974); *Clements* v. *Fashing*, 457 U. S. 957, 977, n. 2 (1982) (BRENNAN, J., dissenting); see also *id.*, at 964–965 (plurality opinion). The necessity for this approach becomes evident when we consider that major parties, which by definition are ordinarily in control of legislative institutions, may seek to perpetuate themselves at the expense of developing minor parties. The application of strict scrutiny to ballot access restrictions ensures that measures taken to further a State's interest in keeping frivolous candidates off the ballot do not incidentally impose an impermissible bar to minor-party access. See Elder, Access to the Ballot By Political Candidates, 83 Dick. L. Rev. 387, 406 (1979); *Williams* v. *Rhodes*, *supra*, at 32.

Appellant argues that there is no ballot access limitation here at all, and thus no need for the application of heightened scrutiny, because minor parties can appear on a *primary* ballot simply by meeting reasonable petition requirements. I cannot accept, however, as a general proposition, that access to *any* ballot is always constitutionally adequate. The Court, in concluding here that the State may reserve the general election ballot for "'major struggles,'" *ante*, at 196, quoting *Storer* v. *Brown*, 415 U. S. 724, 735 (1974), appears to acknowledge that, because of its finality, the general election is the arena where issues are sharpened, policies are hotly de-

bated, and the candidates' positions are clarified. Nonetheless, the Court deems access to the primary adequate to satisfy minor-party rights to ballot access, even though we have characterized the primary election principally as a "forum for continuing intraparty feuds," *Storer* v. *Brown*, *supra*, at 735, rather than an arena for debate on the issues. Access to a primary election ballot is not, in my view, all the access that is due when minor parties are excluded entirely from the general election.[1]

The Court's conclusion stems from a fundamental misconception of the role minor parties play in our constitutional scheme. To conclude that access to a primary ballot is adequate ballot access presumes that minor-party candidates seek only to get elected. But, as discussed earlier, minor-party participation in electoral politics serves to expand and affect political debate. Minor parties thus seek "influence, if not always electoral success." *Illinois Board of Elections* v. *Socialist Workers Party*, *supra*, at 185–186; cf. *Williams* v. *Rhodes*, *supra*, at 32 (States may not keep "all political parties off the ballot until they have enough members to win"). Their contribution to "diversity and competition in the marketplace of ideas," *Anderson* v. *Celebrezze*, 460 U. S. 780, 794 (1983), does not inevitably implicate their ability to *win* elections. That contribution cannot be realized if they are unable to participate meaningfully in the phase of the electoral process in which policy choices are most seriously considered. A statutory scheme that excludes minor parties entirely from this phase places an excessive burden on the

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[1] See *Socialist Workers Party* v. *Secretary of State*, 412 Mich. 571, 317 N. W. 2d 1 (1982), in which the Michigan Supreme Court struck down a statute requiring a showing of voter support at a primary election in order to give new political parties access to the general election ballot. The court found that such "restrictions on access work to eliminate political and ideological alternatives at the time major party candidates are selected and before campaigning has identified and sharpened the issues facing the electorate." *Id.*, at 588, 317 N. W. 2d, at 6–7.

constitutionally protected associational rights of those parties and their adherents.

The Court suggests that any ballot access limitation that merely requires a preliminary showing of support is constitutionally acceptable. *Ante*, at 193. In past cases, however, we have acknowledged only that there is "an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness* v. *Fortson*, 403 U. S. 431, 442 (1971). It still remains for the State to demonstrate that the statute is "properly drawn," employing the "least drastic means" to achieve the State's ends. *Illinois Board of Elections* v. *Socialist Workers Party*, 440 U. S., at 185. The State fails, in my opinion, to do so here.

I am unconvinced that the Washington statute serves the asserted justification for the law: avoiding ballot overcrowding and voter confusion. The statute streamlines the general election, where overcrowding and confusion appear never to have been much of a problem before the 1977 amendments, at the expense of an already cumbersome primary ballot. Between 1907 and 1977, no more than six minor-party candidates ever appeared on the general election ballot for any statewide office, and no more than four ever ran for any statewide office other than Governor, suggesting that the ballot was never very crowded. 765 F. 2d 1417, 1420 (CA9 1985); cf. *Williams* v. *Rhodes*, 393 U. S., at 47 (Harlan, J., concurring in result) ("[T]he presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion"). But in the 1983 special election that prompted this lawsuit, appellee Peoples, instead of being placed on the general election ballot with 2 other candidates, was placed on the primary ballot along with *32* other

candidates: 18 Democrats and 14 Republicans. 765 F. 2d, at 1420.

The Court notes that we have not previously required a State seeking to impose reasonable ballot access restrictions to make a particularized showing that voter confusion in fact existed before those restrictions were imposed. *Ante*, at 194–196. But where the State's solution exacerbates the very problem it claims to solve, the State's means cannot be even rationally related to its asserted ends.

The Court seems not at all troubled by the State's insistence on a clear and unencumbered general election ballot and the State's simultaneous willingness to employ "a long and complicated ballot at the primary." *Ante*, at 196. The Court evidently deems legitimate the State's decision to befuddle the voters in the only election that now matters to minor-party candidates and their adherents in order to guarantee a negligible increase in ballot clarity at the general election. Since minor parties are only allowed access to the primary election ballot, the discovery that the State's asserted interest in an uncrowded ballot coincidentally extends only to the general election has constitutional significance. Rather than alleviating the harm the statute purports to prevent, the law simply shifts any possible harm to the primary election, which, deliberately or unintentionally, decreases the prospect of a minor-party candidate for statewide office qualifying for the general election.

Additionally, while a State may have an interest in eliminating frivolous candidates by requiring candidates to demonstrate "a significant modicum of support" to qualify for a place on the ballot, Washington already had a mechanism that required minor-party candidates to show such support, which it retained after its imposition of the 1% primary vote requirement in 1977. Appellees did not challenge the legitimacy of the convention and petition requirements in this case, but the fact that a mechanism for requiring some showing of support previously existed casts doubt on the need for

the imposition of still another requirement on minor-party candidates. Moreover, the application of the 1% requirement suggests it is overbroad, avoiding frivolous candidacies only by excluding virtually all minor-party candidates from general elections for statewide office.

The only purpose this statute seems narrowly tailored to advance is the impermissible one of protecting the major political parties from competition precisely when that competition would be most meaningful. Because the statute burdens appellees' First Amendment interests, it must be subjected to strict scrutiny; because it fails to pass such scrutiny, it is unconstitutional.

II

Even if I were prepared to adopt the nebulous logic the Court employs in preference to the mandatory strict standard of review in this case, I could not reach the majority's result. While this Court has in the past acknowledged that limits on minor-party access to the ballot may in some circumstances be appropriate, we have made equally clear that States may not employ ballot access limitations which result in the exclusion of minor parties from the ballot. See *Williams* v. *Rhodes*, *supra*. "The Constitution requires that access to the electorate be real, not 'merely theoretical.'" *American Party of Texas*, 415 U. S., at 783, quoting *Jenness* v. *Fortson*, *supra*, at 439.

Under this reasoning, the validity of ballot access limitations is a function of empirical evidence: A minor party is not impermissibly burdened by ballot access restrictions when "a reasonably diligent independent candidate" could be expected to satisfy the ballot access requirement. *Storer* v. *Brown*, 415 U. S., at 742; see *American Party of Texas*, *supra*, at 784, n. 16. We have therefore sustained restrictions on ballot access where they did not impose "insurmountable obstacles to fledgling political party efforts to generate support among the electorate and to evidence that support within the time allowed." 415 U. S., at 784. In

American Party of Texas, we sustained a 1% petition signature requirement because it was apparent that it was, in practice, neither "impossible nor impractical," *id.*, at 783, for minor parties to demonstrate this level of support. Indeed, two of the minor parties that were plaintiffs in *American Party of Texas* qualified candidates for the general election ballot under the ballot access restrictions there at issue. *Id.*, at 779. Similarly, in *Jenness* v. *Fortson*, 403 U. S., at 439, we approved Georgia's 5% petition requirement for ballot access, in part relying on the fact that "[t]he open quality of the Georgia system [was] far from merely theoretical" because a candidate for Governor in 1966 and a candidate for President in 1968 had each gained access to the general election ballot through the nominating petition route.

Here, by contrast, Washington's primary law acts as an almost total bar to minor-party access to statewide general election ballots. Since the revision of Wash. Rev. Code § 29.18.110 in 1977, minor-party candidates have been, in the words of the Court of Appeals, "substantially eliminated from Washington's general election ballot." 765 F. 2d, at 1419. The Court of Appeals found that by 1984, only one minor-party candidate had been able to surmount the 1% barrier and earn the right to participate in the general election. *Ibid.*[2] The legislation leading to this substantial elimination of minor parties from the political arena in Washington's general elections should not be sustained as a legitimate requirement of a demonstration of significant support.

Since *Williams* v. *Rhodes*, this Court has recognized that state legislation may not ensure the continuing supremacy of the two major parties by precluding minor-party access to the ballot as a practical matter. Yet here the Court sustains

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[2] This was the Libertarian candidate for State Treasurer in 1984. Brief for Appellees 9; App. 145–146. Neither the Democratic nor Republican candidates were opposed for their party nomination, and no other minor-party candidates participated in the primary. Sample Primary Election Ballot, Clark County, Washington, Sept. 18, 1984.

a statute that does just that. In doing so, the Court permits a State to pre-empt meaningful participation by minor parties in the political process by requiring them to demonstrate their support in a crowded primary election. The Court thus holds that minor parties may be excised from the electoral process before they have fulfilled their central role in our democratic political tradition: to channel dissent into that process in a constructive fashion. Respectfully, I dissent.

TASHJIAN, SECRETARY OF STATE OF CONNECTICUT *v.* REPUBLICAN PARTY OF CONNECTICUT ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85–766. Argued October 8, 1986—Decided December 10, 1986

A Connecticut statute (§ 9–431), enacted in 1955, requires voters in any political party primary to be registered members of that party. In 1984, appellee Republican Party of Connecticut (Party) adopted a Party rule that permits independent voters—registered voters not affiliated with any party—to vote in Republican primaries for federal and statewide offices. The Party and the Party's federal officeholders and state chairman (also appellees) brought an action in Federal District Court challenging the constitutionality of § 9–431 on the ground that it deprives the Party of its right under the First and Fourteenth Amendments to enter into political association with individuals of its own choosing, and seeking declaratory and injunctive relief. The District Court granted summary judgment in appellees' favor, and the Court of Appeals affirmed.

Held:

1. Section 9–431 impermissibly burdens the rights of the Party and its members protected by the First and Fourteenth Amendments. Pp. 213–225.

(a) The freedom of association protected by those Amendments includes partisan political organization. Section 9–431 places limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community. The fact that the State has the power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote or, as here, the freedom of political association. Pp. 213–217.

(b) The interests asserted by appellant Secretary of State of Connecticut as justification for the statute—that it ensures the administrability of the primary, prevents voter raiding, avoids voter confusion, and protects the integrity of the two-party system and the responsibility

of party government—are insubstantial. The possibility of increases in the cost of administering the election system is not a sufficient basis for infringing appellees' First Amendment rights. The interest in curtailing raiding is not implicated, since § 9–431 does not impede a raid on the Republican Party by independent voters; independent raiders need only register as Republicans and vote in the primary. The interest in preventing voter confusion does not make it necessary to burden the Party's associational rights. And even if the State were correct in arguing that § 9–431 in providing for a closed primary system is designed to save the Party from undertaking conduct destructive of its own interests, the State may not constitutionally substitute its judgment for that of the Party, whose determination of the boundaries of its own association and of the structure that best allows it to pursue its political goals is protected by the Constitution. Pp. 217–225.

2. The implementation of the Party rule will not violate the Qualifications Clause of the Constitution—which provides that the House of Representatives "shall be composed of Members chosen . . . by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"—and the parallel provision of the Seventeenth Amendment, because it does not disenfranchise any voter in a federal election who was qualified to vote in a primary or general election for the more numerous house of the state legislature. The Clause and the Amendment are not violated by the fact that the Party rule establishes qualifications for voting in congressional elections that differ from the qualifications in elections for the state legislature. Where state law, as here, has made the primary an integral part of the election procedure, the requirements of the Clause and the Amendment apply to primaries as well as to general elections. The achievement of the goal of the Clause to prevent the mischief that would arise if state voters found themselves disqualified from participating in federal elections does not require that qualifications for exercise of the federal franchise be precisely equivalent to the qualifications for exercising the franchise in a given State. Pp. 225–229.

770 F. 2d 265, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 230. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 234.

Elliot F. Gerson, Special Assistant Attorney General of Connecticut, argued the cause for appellant. With him on the briefs were *Joseph I. Lieberman*, Attorney General, and *Barney Lapp*, *Daniel R. Schaefer*, and *Henry S. Cohn*, Assistant Attorneys General.

David S. Golub argued the cause and filed a brief for appellees.*

JUSTICE MARSHALL delivered the opinion of the Court.

Appellee Republican Party of the State of Connecticut (Party) in 1984 adopted a Party rule which permits independent voters—registered voters not affiliated with any political party—to vote in Republican primaries for federal and statewide offices. Appellant Julia Tashjian, the Secretary of the State of Connecticut, is charged with the administration of the State's election statutes, which include a provision requiring voters in any party primary to be registered mem-

*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *Robert Hermann*, Solicitor General, *Patrick Barnett-Mulligan*, *Lisa Margaret Smith*, and *Betsy Broder*, Assistant Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, and *Anthony B. Ching*, Solicitor General, *Charles M. Oberly III*, Attorney General of Delaware, *Jim Smith*, Attorney General of Florida, *Neil F. Hartigan*, Attorney General of Illinois, and *Roma J. Stewart*, Solicitor General, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, and *Cabanne Howard*, Deputy Attorney General, *Brian McKay*, Attorney General of Nevada, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Michael Turpen*, Attorney General of Oklahoma, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *W. J. Michael Cody*, Attorney General of Tennessee, and *A. G. McClintock*, Attorney General of Wyoming; and for William J. Cibes, Jr., et al. by *Timothy D. Bates*.

Stephen E. Gottlieb filed a brief for James MacGregor Burns et al. as *amici curiae* urging affirmance.

Bruce A. Morrison, *pro se*, filed a brief for Senator Christopher J. Dodd et al. as *amici curiae*.

bers of that party. Conn. Gen. Stat. § 9–431 (1985).[1] Appellees, who in addition to the Party include the Party's federal officeholders and the Party's state chairman, challenged this eligibility provision on the ground that it deprives the Party of its First Amendment right to enter into political association with individuals of its own choosing. The District Court granted summary judgment in favor of appellees. 599 F. Supp. 1228 (Conn. 1984). The Court of Appeals affirmed. 770 F. 2d 265 (CA2 1985). We noted probable jurisdiction, 474 U. S. 1049 (1986), and now affirm.

I

In 1955, Connecticut adopted its present primary election system. For major parties,[2] the process of candidate selection for federal and statewide offices requires a statewide convention of party delegates; district conventions are held to select candidates for seats in the state legislature. The party convention may certify as the party-endorsed candidate any person receiving more than 20% of the votes cast in a roll-call vote at the convention. Any candidate not endorsed by the party who received 20% of the vote may challenge the party-endorsed candidate in a primary election, in which the candidate receiving the plurality of votes becomes the party's nominee. Conn. Gen. Stat. §§ 9–382, 9–400, 9–444 (1985). Candidates selected by the major parties, whether through convention or primary, are automatically accorded a place on the ballot at the general election.

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[1] The statute provides in pertinent part: "No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district . . . ."

[2] A "major party" is defined as "a political party or organization whose candidate for governor at the last-preceding election for governor received . . . at least twenty per cent of the whole number of votes cast for all candidates for governor." Conn. Gen. Stat. § 9–372(5)(B) (1985). The Democratic and Republican parties are the only major parties in the State under this definition.

§ 9–379. The costs of primary elections are paid out of public funds. See, *e. g.*, § 9–441.

The statute challenged in these proceedings, § 9–431, has remained substantially unchanged since the adoption of the State's primary system. In 1976, the statute's constitutionality was upheld by a three-judge District Court against a challenge by an independent voter who sought a declaration of his right to vote in the Republican primary. *Nader* v. *Schaffer*, 417 F. Supp. 837 (Conn.), summarily aff'd, 429 U. S. 989 (1976). In that action, the Party opposed the plaintiff's efforts to participate in the Party primary.

Subsequent to the decision in *Nader*, however, the Party changed its views with respect to participation by independent voters in Party primaries. Motivated in part by the demographic importance of independent voters in Connecticut politics,[3] in September 1983 the Party's Central Committee recommended calling a state convention to consider altering the Party's rules to allow independents to vote in Party primaries. In January 1984 the state convention adopted the Party rule now at issue, which provides:

> "Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer." App. 20.

During the 1984 session, the Republican leadership in the state legislature, in response to the conflict between the newly enacted Party rule and § 9–431, proposed to amend the statute to allow independents to vote in primaries when permitted by Party rules. The proposed legislation was de-

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[3] The record shows that in October 1983 there were 659,268 registered Democrats, 425,695 registered Republicans, and 532,723 registered and unaffiliated voters in Connecticut. 2 App. to Juris. Statement 244.

feated, substantially along party lines, in both houses of the legislature, which at that time were controlled by the Democratic Party.[4]

The Party and the individual appellees then commenced this action in the District Court, seeking a declaration that § 9–431 infringes appellees' right to freedom of association for the advancement of common political objectives guaranteed by the First and Fourteenth Amendments, and injunctive relief against its further enforcement. After discovery, the parties submitted extensive stipulations of fact to the District Court, which granted summary judgment for appellees. The District Court concluded that "[a]ny effort by the state to substitute its judgment for that of the party on . . . the question of who is and is not sufficiently allied in interest with the party to warrant inclusion in its candidate selection process . . . substantially impinges on First Amendment rights." 599 F. Supp., at 1238. Rejecting the state interests proffered by appellant to justify the statute, the District Court held that "as applied to the Republican Party rule permitting unaffiliated voters to participate in certain Republican Party primaries, the statute abridges the right of association guaranteed by the First Amendment." *Id.*, at 1241.

The Court of Appeals affirmed, holding that § 9–431 "substantially interferes with the Republican Party's first amendment right to define its associational boundaries, determine the content of its message, and engage in effective political association." 770 F. 2d, at 283.

II

We begin from the recognition that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson* v. *Cele-*

[4] In the November 1984 elections, the Republicans acquired a majority of seats in both houses of the state legislature, and an amendment to § 9–431 was passed, but was vetoed by the Democratic Governor.

brezze, 460 U. S. 780, 789 (1983) (quoting *Storer* v. *Brown*, 415 U. S. 724, 730 (1974)). "Instead, a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." 460 U. S., at 789.

The nature of appellees' First Amendment interest is evident. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460 (1958); see *NAACP* v. *Button*, 371 U. S. 415, 430 (1963); *Bates* v. *Little Rock*, 361 U. S. 516, 522–523 (1960). The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. *Elrod* v. *Burns*, 427 U. S. 347, 357 (1976) (plurality opinion); *Buckley* v. *Valeo*, 424 U. S. 1, 15 (1976). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper* v. *Pontikes*, 414 U. S. 51, 57 (1973).

The Party here contends that § 9–431 impermissibly burdens the right of its members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success. The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association. As we have said, the freedom to join together in furtherance of common political beliefs "necessarily presupposes the freedom to identify the people who constitute the association." *Democratic Party of*

United States v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 122 (1981).

A major state political party necessarily includes individuals playing a broad spectrum of roles in the organization's activities. Some of the Party's members devote substantial portions of their lives to furthering its political and organizational goals, others provide substantial financial support, while still others limit their participation to casting their votes for some or all of the Party's candidates. Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important.[5]

Were the State to restrict by statute financial support of the Party's candidates to Party members, or to provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals. As we have said, "'[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.'" *Democratic Party*, *supra*, at 122 (quoting *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957)).[6] The statute here places limits upon the group of

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[5] Indeed, acts of public affiliation may subject the members of political organizations to public hostility or discrimination; under those circumstances an association has a constitutional right to protect the privacy of its membership rolls. *Bates* v. *Little Rock*, 361 U. S. 516, 523–524 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 462 (1958).

[6] It is this element of potential interference with the rights of the Party's members which distinguishes the present case from others in which we have considered claims by nonmembers of a party seeking to vote in that party's primary despite the party's opposition. In this latter class of cases, the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications. See *Rosario* v. *Rockefeller*, 410

registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. *Kusper* v. *Pontikes*, *supra*, at 58. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.[7]

U. S. 752 (1973); *Nader* v. *Schaffer*, 417 F. Supp. 837 (Conn.), summarily aff'd, 429 U. S. 989 (1976). Similarly, the Court has upheld the right of national political parties to refuse to seat at their conventions delegates chosen in state selection processes which did not conform to party rules. See *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107 (1981); *Cousins* v. *Wigoda*, 419 U. S. 477 (1975). These situations are analytically distinct from the present case, in which the Party and its members seek to provide enhanced opportunities for participation by willing nonmembers. Under these circumstances, there is no conflict between the associational interests of members and nonmembers. See generally Note, Primary Elections and the Collective Right of Freedom of Association, 94 Yale L. J. 117 (1984).

[7] Appellant contends that any infringement of the associational right of the Party or its members is *de minimis*, because Connecticut law, as amended during the pendency of this litigation, provides that any previously unaffiliated voter may become eligible to vote in the Party's primary by enrolling as a Party member as late as noon on the last business day preceding the primary. Conn. Gen. Stat. § 9–56 (1985). Thus, appellant contends, any independent voter wishing to participate in any Party primary may do so.

This is not a satisfactory response to the Party's contentions for two reasons. First, as the Court of Appeals noted, the formal affiliation process is one which individual voters may employ in order to associate with the Party, but it provides no means by which the members of the Party may choose to broaden opportunities for joining the association by their own act, without any intervening action by potential voters. 770 F. 2d, at 281, n. 24. Second, and more importantly, the requirement of public affiliation with the Party in order to vote in the primary conditions the exercise of the associational right upon the making of a public statement of adherence to the Party which the State requires regardless of the actual beliefs of the individual voter. Cf. *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 633–634 (1943). As counsel for appellees conceded at oral argument, a requirement that independent voters merely notify state authorities of their inten-

It is, of course, fundamental to appellant's defense of the State's statute that this impingement upon the associational rights of the Party and its members occurs at the ballot box, for the Constitution grants to the States a broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices. But this authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens. The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, see *Wesberry* v. *Sanders*, 376 U. S. 1, 6–7 (1964), or, as here, the freedom of political association. We turn then to an examination of the interests which appellant asserts to justify the burden cast by the statute upon the associational rights of the Party and its members.

III

Appellant contends that § 9–431 is a narrowly tailored regulation which advances the State's compelling interests by ensuring the administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government.

A

Although it was not presented to the Court of Appeals as a basis for the defense of the statute, appellant argues here that the administrative burden imposed by the Party rule is a sufficient ground on which to uphold the constitutionality of

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tion to vote in the Party primary would be acceptable as an administrative measure, but "[t]he problem is that the State is insisting on a public act of affiliation . . . joining the Republican Party as a condition of this association." Tr. of Oral Arg. 40.

§ 9–431.[8] Appellant contends that the Party's rule would require the purchase of additional voting machines, the training of additional poll workers, and potentially the printing of additional ballot materials specifically intended for independents voting in the Republican primary. In essence, appellant claims that the administration of the system contemplated by the Party rule would simply cost the State too much.

Even assuming the factual accuracy of these contentions, which have not been subjected to any scrutiny by the District Court, the possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees' First Amendment rights. Costs of administration would likewise increase if a third major party should come into existence in Connecticut, thus requiring the State to fund a third major-party primary. Additional voting machines, poll workers, and ballot materials would all be necessary under these circumstances as well. But the State could not forever protect the two existing major parties from competition solely on the ground that two major parties are all the public can afford. Cf. *Anderson* v. *Celebrezze*, 460 U. S. 780 (1983); *Williams* v. *Rhodes*, 393 U. S. 23 (1968). While the State is of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, it can no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party.

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[8] The District Court entered no findings of fact as to the potential administrative changes necessary to implement the Party rule. As appellant conceded at oral argument, the only evidence in the record before the District Court relating to the administration of the rule was a statement by the State's election attorney in testimony before the legislature that the system would be "workable." *Id.*, at 20. Appellant relies here upon affidavits concerning potential administrative burden which were submitted to the Court of Appeals in support of appellant's request for a stay, entered after this Court noted probable jurisdiction.

B

Appellant argues that § 9–431 is justified as a measure to prevent raiding, a practice "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario* v. *Rockefeller*, 410 U. S. 752, 760 (1973). While we have recognized that "a State may have a legitimate interest in seeking to curtail 'raiding,' since that practice may affect the integrity of the electoral process," *Kusper* v. *Pontikes*, 414 U. S., at 59–60; *Rosario* v. *Rockefeller*, *supra*, at 761, that interest is not implicated here.[9] The statute as applied to the Party's rule prevents independents, who otherwise cannot vote in any primary, from participating in the Republican primary. Yet a raid on the Republican Party primary by independent voters, a curious concept only distantly related to the type of raiding discussed in *Kusper* and *Rosario*, is not impeded by § 9–431; the independent raiders need only register as Republicans and vote in the primary. Indeed, under Conn. Gen. Stat. § 9–56 (1985), which permits an independent to affiliate with the Party as late as noon on the business day preceding the primary, see n. 7, *supra*, the State's election statutes actually *assist* a "raid" by independents, which could be organized and implemented at the 11th hour. The State's asserted interest in the prevention of raiding provides no justification for the statute challenged here.

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[9] As we have previously noted, a study commission established by the national Democratic Party concluded that "'the existence of "raiding" has never been conclusively proven by survey research.'" *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S., at 122–123, n. 23 (quoting Openness, Participation and Party Building: Reforms for a Stronger Democratic Party 68 (Feb. 17, 1978)). In view of our conclusion that § 9–431 is irrelevant to the question of raiding, we express no opinion as to whether the continuing difficulty of proving that raiding is possible attenuates the asserted state interest in preventing the practice.

C

Appellant's next argument in support of § 9–431 is that the closed primary system avoids voter confusion. Appellant contends that "[t]he legislature could properly find that it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name." Brief for Appellant 59. Appellees respond that the State is attempting to act as the ideological guarantor of the Republican Party's candidates, ensuring that voters are not misled by a "Republican" candidate who professes something other than what the State regards as true Republican principles. Brief for Appellees 28.

As we have said, "[t]here can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Anderson* v. *Celebrezze*, 460 U. S., at 796. To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise. Appellant's argument depends upon the belief that voters can be "misled" by party labels. But "[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Id.*, at 797. Moreover, appellant's concern that candidates selected under the Party rule will be the nominees of an "amorphous" group using the Party's name is inconsistent with the facts. The Party is not proposing that independents be allowed to choose the Party's nominee without Party participation; on the contrary, to be listed on the Party's primary ballot continues to require, under a statute not challenged here, that the primary candidate have obtained at least 20% of the vote at a Party convention, which only Party

members may attend. Conn. Gen. Stat. § 9–400 (1985). If no such candidate seeks to challenge the convention's nominee in a primary, then no primary is held, and the convention nominee becomes the Party's nominee in the general election without any intervention by independent voters.[10] Even assuming, however, that putative candidates defeated at the Party convention will have an increased incentive under the Party's rule to make primary challenges, hoping to attract more substantial support from independents than from Party delegates, the requirement that such challengers garner substantial minority support at the convention greatly attenuates the State's concern that the ultimate nominee will be wedded to the Party in nothing more than a marriage of convenience.

In arguing that the Party rule interferes with educated decisions by voters, appellant also disregards the substantial benefit which the Party rule provides to the Party and its members in seeking to choose successful candidates. Given the numerical strength of independent voters in the State, one of the questions most likely to occur to Connecticut Republicans in selecting candidates for public office is how can the Party most effectively appeal to the independent voter? By inviting independents to assist in the choice at the polls between primary candidates selected at the Party convention, the Party rule is intended to produce the candidate and platform most likely to achieve that goal. The state statute is said to decrease voter confusion, yet it deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party's candidates among a critical group of electors. "A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson* v. *Celebrezze*, *supra*, at 798. The State's legitimate interests in preventing voter confusion

[10] The record does not disclose the proportion of Connecticut Republican Party nominations that are the result of primary contests.

and providing for educated and responsible voter decisions in no respect "make it necessary to burden the [Party's] rights." 460 U. S., at 789.

D

Finally, appellant contends that § 9–431 furthers the State's compelling interest in protecting the integrity of the two-party system and the responsibility of party government. Appellant argues vigorously and at length that the closed primary system chosen by the state legislature promotes responsiveness by elected officials and strengthens the effectiveness of the political parties.

The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century, and no consensus has as yet emerged.[11] Appellant

[11] At the present time, 21 States provide for "closed" primaries of the classic sort, in which the primary voter must be registered as a member of the party for some period of time prior to the holding of the primary election. See Ariz. Rev. Stat. Ann. § 16–467 (1984); Cal. Elec. Code Ann. § 501 (West Supp. 1986); Colo. Rev. Stat. § 1–2–203 (Supp. 1986); Conn. Gen. Stat. § 9–431 (1985); Del. Code Ann., Tit. 15, § 3161 (1981); Fla. Stat. § 101.021 (1985); Kan. Stat. Ann. § 25–3301 (1981); Ky. Rev. Stat. §§ 116.045, 116.055 (1982); Me. Rev. Stat. Ann., Tit. 21–A, § 141 *et seq.* (Supp. 1986–1987); Md. Ann. Code, Art. 33, § 3–8 *et seq.* (1985); Neb. Rev. Stat. § 32–530 (1984); Nev. Rev. Stat. § 293.287 (1985); N. M. Stat. Ann. § 1–4–16 (1985); N. Y. Elec. Law § 1–104.9 (McKinney 1978); N. C. Gen. Stat. § 163.74 (1982 and Supp. 1985); Okla. Stat., Tit. 26, § 1–104 (1976); Ore. Rev. Stat. § 247.201 (1985); Pa. Stat. Ann., Tit. 25, § 2832 (Purdon 1963); S. D. Codified Laws § 12–4–15 (1982); W. Va. Code § 3–1–35 (1979); Wyo. Stat. § 22–5–212 (1977). Sixteen States allow a voter previously unaffiliated with any party to vote in a party primary if he affiliates with the party at the time of, or for the purpose of, voting in the primary. See Ala. Code § 17–16–14(b) (1985); Ark. Stat. Ann. § 3–126 (1976); Ga. Code Ann. § 21–2–235 (1982); Ill. Rev. Stat., ch. 46, ¶ 7–43(a) (1986); Ind. Code § 3–10–1–6 (Supp. 1986); Iowa Code §§ 43.41, 43.42 (1985); Mass. Gen. Laws § 53:37 (1984); Miss. Code Ann. § 23–15–575 (1986 pamphlet); Mo. Rev. Stat. § 115.397 (1978); N. H. Rev. Stat. Ann. § 654:34II (1986); N. J. Stat. Ann. § 19:23–45 (West Supp. 1986); Ohio Rev. Code Ann. § 3513.19 (Supp. 1985); R. I. Gen. Laws § 17–9–26(c) (1981); S. C. Code §§ 7–5–120, 7–9–20 (1976 and Supp. 1985); Tenn. Code Ann. § 2–7–115(b)(2) (1985); Tex.

invokes a long and distinguished line of political scientists and public officials who have been supporters of the closed primary. But our role is not to decide whether the state legislature was acting wisely in enacting the closed primary system in 1955, or whether the Republican Party makes a mistake in seeking to depart from the practice of the past 30 years.[12]

We have previously recognized the danger that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Storer* v. *Brown*, 415 U. S., at 736. We upheld a California statute which denied access to the ballot to any independent candidate who had voted in a party primary or been registered as a member of a political party within one year prior to the immediately preceding primary election. We said:

> "[T]he one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late

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Elec. Code Ann. § 162.003 (1986). Four States provide for nonpartisan primaries in which all registered voters may participate, Alaska Stat. Ann. §§ 15.05.010, 15.25.090 (1982); La. Rev. Stat. Ann. §§ 18:401B, 18:521B (West 1979 and Supp. 1986); Va. Code § 24.1–182 (1985); Wash. Rev. Code § 29.18.200 (1965), while nine States have adopted classical "open" primaries, in which all registered voters may choose in which party primary to vote. Haw. Rev. Stat. § 12–31 (Supp. 1984); Idaho Code §§ 34–402, 34–404, 34–904 (Supp. 1986); Mich. Comp. Laws §§ 168.575, 168.576 (1967 and Supp. 1986); Minn. Stat. § 204D.08(4) (1985); Mont. Code Ann. § 13–10–301(2) (1985); N. D. Cent. Code § 16.1–11–22 (Supp. 1985); Utah Code Ann. § 20–3–19(2) (Supp. 1986); Vt. Stat. Ann., Tit. 17, § 2363 (1982); Wis. Stat. §§ 5.37, 6.80 (1983–1984).

[12] We note that appellant's direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 States which have chosen to permit more substantial openness in their primary systems than Connecticut has permitted heretofore.

rather than an early decision to seek independent ballot status." *Ibid.*

The statute in *Storer* was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. This protection, like that accorded to parties threatened by raiding in *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), is undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates. The forms of regulation upheld in *Storer* and *Rosario* imposed certain burdens upon the protected First and Fourteenth Amendment interests of some individuals, both voters and potential candidates, in order to protect the interests of others. In the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.

Under these circumstances, the views of the State, which to some extent represent the views of the one political party transiently enjoying majority power, as to the optimum methods for preserving party integrity lose much of their force. The State argues that its statute is well designed to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point "even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S., at 123–124 (footnote omitted). The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution. "And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational." *Id.*, at 124.[13]

[13] Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all

We conclude that the State's enforcement, under these circumstances, of its closed primary system burdens the First Amendment rights of the Party. The interests which the appellant adduces in support of the statute are insubstantial, and accordingly the statute, as applied to the Party in this case, is unconstitutional.

IV

Appellant argues here, as in the courts below, that implementation of the Party rule would violate the Qualifications Clause of the Constitution, Art. I, § 2, cl. 1, and the Seventeenth Amendment because it would establish qualifications for voting in congressional elections which differ from the voting qualifications in elections for the more numerous house of the state legislature.[14] The Party rule as adopted permits independent voters to vote in Party primaries for the offices of United States Senator and Member of the House of Representatives, and for statewide offices, but is silent as re-

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voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in *Storer* v. *Brown*, 415 U. S. 724 (1974), and *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), were designed to prevent. We have observed on several occasions that a State may adopt a "policy of confining each voter to a single nominating act," a policy decision which is not involved in the present case. See *Anderson* v. *Celebrezze*, 460 U. S. 780, 802, n. 29 (1983); *Storer* v. *Brown*, *supra*, at 743. The analysis of these situations derives much from the particular facts involved. "The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'" *Anderson* v. *Celebrezze*, *supra*, at 789–790 (quoting *Storer* v. *Brown*, *supra*, at 730).

[14] Article I, § 2, cl. 1, provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment, which provides for the direct election of United States Senators, states in pertinent part that "[t]he electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

gards primaries held to contest nominations for seats in the state legislature. See *supra*, at 212. Appellant contends that the Qualifications Clause and the Seventeenth Amendment require an absolute symmetry of qualifications to vote in elections for Congress and the lower house of the state legislature, and that the Party rule, if implemented according to its terms, would require lesser qualifications for voting in Party primaries for federal office than for state legislative office.

The Court of Appeals rejected appellant's argument, holding that the Qualifications Clause and the parallel provision of the Seventeenth Amendment do not apply to primary elections. 770 F. 2d, at 274. The concurring opinion took a different view, reaching the conclusion that these provisions require only that "anyone who is permitted to vote for the most numerous branch of the state legislature has to be permitted to vote" in federal legislative elections. *Id.*, at 286 (Oakes, J., concurring). We agree.

We recognize that the Federal Convention, in adopting the Qualifications Clause of Article I, § 2, was not contemplating the effects of that provision upon the modern system of party primaries. As we have said:

> "We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses." *United States* v. *Classic*, 313 U. S. 299, 315–316 (1941).

The fundamental purpose underlying Article I, § 2, cl. 1, that "[t]he House of Representatives shall be composed of Members chosen . . . by the People of the several States," like the parallel provision of the Seventeenth Amendment, applies to the entire process by which federal legislators are chosen. "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice," the requirements of Article I, § 2, cl. 1, and the Seventeenth Amendment apply to primaries as well as to general elections. *United States* v. *Classic*, *supra*, at 318; see *Smith* v. *Allwright*, 321 U. S. 649, 659–660 (1944). The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every stage in the selection process. If primaries were not subject to the requirements of the Qualifications Clauses contained in Article I, § 2 and the Seventeenth Amendment, the fundamental principle of free electoral choice would be subject to the sort of erosion these prior decisions were intended to prevent.

Accordingly, we hold that the Qualifications Clauses of Article I, § 2, and the Seventeenth Amendment are applicable to primary elections in precisely the same fashion that they apply to general congressional elections. Our task is then to discover whether, as appellant contends, those provisions require that voter qualifications, such as party membership, in primaries for federal office must be absolutely symmetrical with those pertaining to primaries for state legislative office.

Our inquiry begins with an examination of the Framers' purpose in enacting the first Qualifications Clause. It is clear that the Clause was intended to avoid the consequences of declaring a single standard for exercise of the franchise in federal elections. The state governments represented at the Convention had established varying voter qualifications, and substantial concern was expressed by delegates as to the likely effects of a federal voting qualification which disenfranchised voters eligible to vote in the States. James

Wilson argued that "[i]t would be very hard and disagreeable for the same persons, at the same time, to vote for representatives in the State Legislature, and to be excluded from a vote for those in the National Legislature." J. Madison, Journal of the Federal Convention 467 (E. Scott ed. 1893) (hereinafter Madison's Journal). Oliver Ellsworth predicted that "[t]he people will not readily subscribe to a National Constitution, if it should subject them to be disfranchised." *Id.*, at 468. Benjamin Franklin argued, in the same vein, that "[t]he sons of a substantial farmer, not being themselves freeholders, would not be pleased at being disfranchised, and there are a great many persons of that description." *Id.*, at 471. James Madison later defended the resulting provision on similar grounds:

> "To have reduced the different qualifications in the different States, to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the Convention. The provision made by the Convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself." The Federalist No. 52, p. 354 (J. Cooke ed. 1961).

In adopting the language of Article I, § 2, cl. 1, the Convention rejected the suggestion that a property qualification was necessary to restrict the availability of the federal franchise. See Madison's Journal 468–473; 2 M. Farrand, The Records of the Federal Convention of 1787, pp. 200–216 (1966). Far from being a device to limit the federal suffrage, the Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections. The achievement of this goal does not require that qualifications for exercise of the federal franchise be at all

times precisely equivalent to the prevailing qualifications for the exercise of the franchise in a given State. The fundamental purpose of the Qualifications Clauses contained in Article I, § 2, and the Seventeenth Amendment is satisfied if all those qualified to participate in the selection of members of the more numerous branch of the state legislature are also qualified to participate in the election of Senators and Members of the House of Representatives.

Our conclusion that these provisions do not require a perfect symmetry of voter qualifications in state and federal legislative elections takes additional support from the fact that we have not previously required such absolute symmetry when the federal franchise has been expanded. In *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), five Justices agreed that the Voting Rights Act Amendments of 1970 could constitutionally establish a minimum age of 18 for voters in federal elections, while a majority of the Court also concluded that Congress was without power to set such a minimum age in state and local elections. See *id.*, at 117–118 (Black, J., announcing the judgments of the Court). Appellant's reading of the Qualifications Clause, which would require identical voter qualifications in state and federal legislative elections, is plainly inconsistent with these holdings. We hold that the implementation of the Party rule does not violate the Qualifications Clause or the Seventeenth Amendment because it does not disenfranchise any voter in a federal election who is qualified to vote in a primary or general election for the more numerous house of the state legislature.

V

We conclude that § 9–431 impermissibly burdens the rights of the Party and its members protected by the First and Fourteenth Amendments. The interests asserted by appellant in defense of the statute are insubstantial. The judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE SCALIA joins, dissenting.

The threshold issue presented by this case is whether, consistently with the Constitution, a State may permit a voter to participate in elections to the Congress while preventing that same person from voting for candidates to the most numerous branch of the state legislature. If we respect the plain language of Article I, § 2, cl. 1, of the Constitution and the Seventeenth Amendment, the intent of the Framers, and the reasoning of the opinions in *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), we must answer that question in the negative.

Every person who votes in a federal election for a Member of the House of Representatives or for a United States Senator must be qualified to vote for candidates to the most numerous branch of the state legislature. The Constitution has imposed this condition of voter eligibility on congressional elections since 1789[1] and on senatorial elections since the Seventeenth Amendment was ratified in 1913.[2]

As the Court recognizes, *ante*, at 227, a primary election is part of the process by which Members of the House and Senate are "chosen . . . by the People." U. S. Const., Art. I, § 2, cl. 1. Cf. *United States* v. *Classic*, 313 U. S. 299, 315 (1941). In Connecticut one of the qualifications for voters in Republican Party primary elections for the lower house of the state legislature is that the person be "on the last-completed enrolment list of such party in the municipality or voting district . . . ." Conn. Gen. Stat. § 9–431 (1985). Thus, only enrolled Republicans may vote in the Republican primary for the state legislature.

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[1] Article I, § 2, cl. 1, provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

[2] "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

The Court today holds, however, that pursuant to the Republican Party of Connecticut's rules, the State must permit independent, as well as enrolled Republican, electors to vote in the Republican primary for the House of Representatives and the Senate of the United States. This facial disparity between the qualifications for electors of House and Senate candidates and the more stringent qualifications for electors to the state legislature violates both Qualifications Clauses.

The Court does not dispute the fact that the plain language of the Constitution requires that voters in congressional and senatorial elections "shall have" the qualifications of voters in elections to the state legislature. The Court nevertheless separates the federal voter qualifications from their state counterparts, inexplicably treating the mandatory "shall have" language of the Clauses as though it means only that the federal voters "may but need not have" the qualifications of state voters. In support of this freewheeling interpretation of the Constitution, the Court relies on what it describes as the Framers' purpose in enacting the first Qualification Clause and on the judgment in *Oregon* v. *Mitchell*, *supra*. Neither of these arguments withstands scrutiny.

The excerpts from the debate among the Framers quoted by the Court, *ante*, at 227–229, related to a motion made by Gouverneur Morris to amend a draft of proposed Art. I, § 1, that had been prepared by the Committee on Detail. To understand the full significance of that debate it is necessary first to consider the provision that Gouverneur Morris wanted to change and then to consider the nature of his proposed amendment.

Justice Stewart accurately summarized that background in his opinion in *Oregon* v. *Mitchell*, *supra:*

> "An early draft of the Constitution provided that the States should fix the qualifications of voters in congressional elections subject to the proviso that these qualifications might 'at any Time be altered and superseded by the Legislature of the United States.' The records of

> the Committee on Detail show that it was decided to strike the provision granting to Congress the authority to set voting qualifications and to add in its stead a clause making the qualifications 'the same from Time to Time as those of the Electors, in the several States, of the most numerous Branch of their own Legislatures.' The proposed draft reported by the Committee on Detail to the Convention included the following:
>
> "'The qualifications of the electors *shall be the same*, from time to time, as those of the electors in the several States, of the most numerous branch of their own legislatures.' Art. IV, § 1." 400 U. S., at 289 (concurring in part and dissenting in part) (footnotes omitted; emphasis added).

Thus, the draft that the Federal Convention of 1787 was considering when Gouverneur Morris made his motion was abundantly clear—the qualifications of the federal electors "shall be the same" as the electors of the legislatures of the several States. J. Madison, Journal of the Federal Convention 449–450 (E. Scott ed. 1893). This provision would ensure uniformity of electors' qualifications within each State, but would not impose a uniform nationwide standard.[3]

It was this clause that Gouverneur Morris proposed to strike in order to substitute a clause permitting Congress to prescribe the electoral qualifications or to adopt a provision "which would restrain the right of suffrage to freeholders." *Id.*, at 467. Not surprisingly, his proposal was defeated by a vote of 7 to 1 because it would have disenfranchised a large number of voters in States that did not impose a property qualification on the right to vote. *Id.*, at 467, 468, 471–472. Despite the Court's reliance on the concerns that led the

[3] James Wilson referred to this part of the Report of the Committee on Detail as "well considered," and "he did not think it could be changed for the better. It was difficult to form any uniform rule of qualifications, for all the States." J. Madison, Journal of the Federal Convention 467 (E. Scott ed. 1893).

Framers to reject the Morris proposal, they shed absolutely no light on the reasons why the Committee on Detail had previously decided that the voters' qualifications in state and federal elections "shall be the same."

The Court's reliance on the holding in *Oregon* v. *Mitchell* is equally misguided. That case tested the constitutionality of certain parts of the Voting Rights Act Amendments of 1970, 84 Stat. 314, including the section that lowered the minimum age of voters in both state and federal elections from 21 to 18. Four Members of the Court concluded that Congress had no such power;[4] four other Members of the Court concluded that the entire statute was valid.[5] Thus, the conclusions of all eight of those Justices were consistent with the proposition that the Constitution requires the same qualifications for state and federal elections.[6] Only Justice Black concluded that the statute was invalid insofar as it applied to state elections but valid insofar as it applied to federal elections. 400 U. S., at 125–130.

Even Justice Black's reasoning, however, supports a literal reading of the Qualifications Clause in the absence of a federal statute prescribing a different rule for federal elections. For he relied entirely on the provision in Art. I, § 4, that empowers Congress to alter a State's regulations concerning the times, places, and manner of holding elections for Senators and Representatives. 400 U. S., at 119–124. In Justice

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[4] See opinion of Justice Harlan, 400 U. S., at 152, 212–213 (concurring in part and dissenting in part), and opinion of Justice Stewart, *id.*, at 281, 287–289 (joined by Burger, C. J., and BLACKMUN, J.).

[5] See opinion of Justice Douglas, *id.*, at 135, 141–144, and the joint opinion, *id.*, at 229, 280–281 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

[6] This was certainly the view of Justice Harlan, see *id.*, at 210–211, and of Justice Stewart and the two Justices who joined his opinion, see *id.*, at 287–290. As Justice Stewart observed: "The Constitution thus adopts as the federal standard the standard which each State has chosen for itself." *Id.*, at 288. The opinions of Justice Douglas and JUSTICE BRENNAN are silent on the issue.

Black's opinion, the qualifications that the States prescribed for their own voters for state offices "were adopted for federal offices unless Congress directs otherwise under Art. I, §4." *Id.*, at 125.

In this case there is no federal statute that purports to authorize the State of Connecticut to prescribe different qualifications for state and federal elections. Thus, there is no authority whatsoever for the Court's refusal to honor the plain language of the Qualifications Clauses. An interpretation of that language linking federal voters' qualifications in each State to the States' existing qualifications exactly matches James Madison's understanding:

> "The provision made by the Convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself." The Federalist No. 52, p. 354 (J. Cooke ed. 1961).

I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Both the right of free political association and the State's authority to establish arrangements that assure fair and effective party participation in the election process are essential to democratic government. Our cases make it clear that the accommodation of these two vital interests does not lend itself to bright-line rules but requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case. See *Anderson* v. *Celebrezze*, 460 U. S. 780, 788–790 (1983); *Storer* v. *Brown*, 415 U. S. 724, 730 (1974). Even so, the conclusion reached on the individuated facts of one case sheds some measure of light upon the conclusion that will be reached on the individuated facts of the next. Since this is an area, moreover, in which the predictability of decisions is impor-

tant, I think it worth noting that for me today's decision already exceeds the permissible limit of First Amendment restrictions upon the States' ordering of elections.

In my view, the Court's opinion exaggerates the importance of the associational interest at issue, if indeed it does not see one where none exists. There is no question here of restricting the Republican Party's ability to recruit and enroll Party members by offering them the ability to select Party candidates; Conn. Gen. Stat. § 9–56 (1985) permits an independent voter to join the Party as late as the day before the primary. Cf. *Kusper* v. *Pontikes*, 414 U. S. 51 (1973). Nor is there any question of restricting the ability of the Party's members to select whatever candidate they desire. Appellees' only complaint is that the Party cannot leave the selection of its candidate to persons who are *not* members of the Party, and are unwilling to become members. It seems to me fanciful to refer to this as an interest in freedom of association between the members of the Republican Party and the putative independent voters. The Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an "association" with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use. See *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 130–131 (1981) (POWELL, J., dissenting) ("[Not] every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights"; one must "look closely at the nature of the intrusion, in light of the nature of the association involved, to see whether we are presented with a real limitation on First Amendment freedoms").

The ability of the members of the Republican Party to select their own candidate, on the other hand, unquestionably

implicates an associational freedom—but it can hardly be thought that that freedom is unconstitutionally impaired here. The Party is entirely free to put forward, if it wishes, that candidate who has the highest degree of support among Party members and independents combined. The State is under no obligation, however, to let its party primary be used, instead of a party-funded opinion poll, as the means by which the party identifies the relative popularity of its potential candidates among independents. Nor is there any reason apparent to me why the State cannot insist that this decision to support what might be called the independents' choice be taken *by the party membership in a democratic fashion*, rather than through a process that permits the members' votes to be diluted—and perhaps even absolutely outnumbered—by the votes of outsiders.

The Court's opinion characterizes this, disparagingly, as an attempt to "protec[t] the integrity of the Party against the Party itself." *Ante*, at 224. There are two problems with this characterization. The first, and less important, is that it is not true. We have no way of knowing that a majority of the Party's members is in favor of allowing ultimate selection of its candidates for federal and statewide office to be determined by persons outside the Party. That decision was not made by democratic ballot, but by the Party's state convention—which, for all we know, may have been dominated by officeholders and office seekers whose evaluation of the merits of assuring election of the Party's candidates, vis-à-vis the merits of proposing candidates faithful to the Party's political philosophy, diverged significantly from the views of the Party's rank and file. I had always thought it was a major purpose of state-imposed party primary requirements to protect the general party membership against this sort of minority control. See *Nader* v. *Schaffer*, 417 F. Supp. 837, 843 (Conn.), summarily aff'd, 429 U. S. 989 (1976). Second and more important, however, *even if* it were the fact that the majority of the Party's members wanted its candidates to be

determined by outsiders, there is no reason why the State is bound to honor that desire—any more than it would be bound to honor a party's democratically expressed desire that its candidates henceforth be selected by convention rather than by primary, or by the party's executive committee in a smoke-filled room. In other words, the validity of the state-imposed primary requirement itself, which we have hitherto considered "too plain for argument," *American Party of Texas* v. *White*, 415 U. S. 767, 781 (1974), presupposes that the State *has* the right "to protect the Party against the Party itself." Connecticut may lawfully require that significant elements of the democratic election process be democratic—whether the Party wants that or not. It is beyond my understanding why the Republican Party's delegation of its democratic choice to a Republican Convention can be proscribed, but its delegation of that choice to nonmembers of the Party cannot.

In the case before us, Connecticut has said no more than this: Just as the Republican Party may, if it wishes, nominate the candidate recommended by the Party's executive committee, so long as its members select that candidate by name in a democratic vote; so also it may nominate the independents' choice, so long as its members select him by name in a democratic vote. That seems to me plainly and entirely constitutional.

I respectfully dissent.

FEDERAL ELECTION COMMISSION *v.* MASSACHUSETTS CITIZENS FOR LIFE, INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 85–701. Argued October 7, 1986—Decided December 15, 1986

Section 316 of the Federal Election Campaign Act (FECA) prohibits corporations from using treasury funds to make an expenditure "in connection with" any federal election, and requires that any expenditure for such purpose be financed by voluntary contributions to a separate segregated fund. Appellee is a nonprofit, nonstock corporation, whose purpose is to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activities. To further this purpose, it has published a newsletter that has been distributed to contributors and to noncontributors who have expressed support for the organization. In September 1978, appellee prepared and distributed a "Special Edition" exhorting readers to vote "pro-life" in the upcoming primary elections in Massachusetts, listing the candidates for each state and federal office in every voting district in the State, and identifying each one as either supporting or opposing appellee's views. While some 400 candidates were listed, the photographs of only 13 were featured, all of whom were identified as favoring appellee's views. The publication was prepared by a staff that had prepared no regular newsletter, was distributed to a much larger audience than that of the regular newsletter, most of whom were members of the general public, and was financed by money taken from appellee's general treasury funds. A complaint was filed with appellant Federal Election Commission (FEC) alleging that the "Special Edition" violated § 316 as representing an expenditure of funds from a corporate treasury to distribute to the general public a campaign flyer on behalf of certain political candidates. After the FEC determined that there was probable cause to believe that appellee had violated the statute, the FEC filed a complaint in Federal District Court, seeking a civil penalty and other relief. The District Court granted appellee's motion for summary judgment, holding that § 316 did not apply to appellee but that if it did it was unconstitutional as a violation of the First Amendment. The Court of Appeals held that the statute applied to appellee and as so applied was unconstitutional.

Held: The judgment is affirmed.

769 F. 2d 13, affirmed.

JUSTICE BRENNAN delivered the opinion of the Court as to Parts I, II, III–B, and III–C, concluding that:

1. Appellee's publication and distribution of the "Special Edition" violated § 316. Pp. 245–251.

(a) There is no merit to appellee's contention that preparation and distribution of the "Special Edition" does not fall within § 316's definition of "expenditure" as the provision of various things of value "to any candidate, campaign committee, or political party or organization, in connection with any election," especially since the general definitions section of the FECA broadly defines "expenditure" as including provision of anything of value made "for the purpose of influencing any election for Federal office." Moreover, the legislative history clearly confirms that § 316 was meant to proscribe expenditures in connection with an election. That history makes clear that Congress has long regarded it as insufficient merely to restrict payments made directly to candidates or campaign organizations. Pp. 245–248.

(b) An expenditure must constitute "express advocacy" in order to be subject to § 316's prohibition. Here, the publication of the "Special Edition" constituted "express advocacy," since it represented express advocacy of the election of particular candidates distributed to members of the general public. Pp. 248–250.

(c) Appellee is not entitled to the press exemption under the FECA reserved for any news story, commentary, or editorial distributed through any "periodical publication," since even assuming that appellee's regular newsletter is exempt under this provision, the "Special Edition" cannot be considered comparable to any single issue of the newsletter in view of the method by which it was prepared and distributed. Pp. 250–251.

2. Section 316's restriction of independent spending is unconstitutional as applied to appellee, for it infringes protected speech without a compelling justification for such infringement. The concern underlying the regulation of corporate political activity—that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace—is absent with regard to appellee. Appellee was formed to disseminate political ideas, not to amass capital. It has no shareholders or other persons having a claim on its assets or earnings, but obtains its funds from persons who make contributions to further the organization's political purposes. It was not established by a business corporation or a labor union, and its policy is not to accept contributions from such entities. Pp. 256–265.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE SCALIA, concluded in Part III–A that the practical effect of applying § 316 to appellee of discouraging protected speech is sufficient to characterize § 316 as an infringement on First Amendment activities. As a corporation, appellee is subject to more extensive requirements and more stringent restrictions under the FECA than it would be if was not incorporated. These include detailed recordkeeping and disclosure obligations, the requirement of a complex and formalized organization, and a limitation on whom can be solicited for contributions, all of which create a disincentive for such an organization to engage in political speech. Pp. 251–256.

JUSTICE O'CONNOR, agreeing that § 316 is unconstitutional as applied to appellee's conduct at issue, concluded that the significant burden on appellee comes not from the statute's disclosure requirements that appellee must satisfy, but from the additional organizational restraints imposed upon it by the statute. These restraints do not further the Government's informational interest in campaign disclosure and cannot be justified by any of the other interests identified by the FEC. Pp. 265–266.

BRENNAN, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Parts I and II, an opinion of the Court with respect to Parts III–B and III–C, in which MARSHALL, POWELL, O'CONNOR, and SCALIA, JJ., joined, and an opinion with respect to Part III–A, in which MARSHALL, POWELL, and SCALIA, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 265. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which WHITE, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 266. WHITE, J., filed a separate statement, *post*, p. 271.

Charles N. Steele argued the cause for appellant. With him on the briefs was *Richard B. Bader*.

Francis H. Fox argued the cause for appellee. With him on the brief was *E. Susan Garsh*.*

**Roger M. Witten, William T. Lake, Carol F. Lee*, and *Archibald Cox* filed a brief for Common Cause as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Marjorie Heins, Burt Neuborne*, and *Jack Novik;* for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Chamber of Commerce of the United States by *Judith K. Richmond, Stephen A. Bokat, Robin S. Conrad*, and *Jan W. Baran;* for the Home Builders Association of Massachusetts by *Wayne S. Henderson;* for the National Rifle Association of America by *James J.*

JUSTICE BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–B, and III–C, and an opinion with respect to Part III–A, in which JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE SCALIA join.

The questions for decision here arise under § 316 of the Federal Election Campaign Act (FECA or Act), 90 Stat. 490, as renumbered and amended, 2 U. S. C. § 441b. The first question is whether appellee Massachusetts Citizens for Life, Inc. (MCFL), a nonprofit, nonstock corporation, by financing certain activity with its treasury funds, has violated the restriction on independent spending contained in § 441b. That section prohibits corporations from using treasury funds to make an expenditure "in connection with" any federal election, and requires that any expenditure for such purpose be financed by voluntary contributions to a separate segregated fund. If appellee has violated § 441b, the next question is whether application of that section to MCFL's conduct is constitutional. We hold that the appellee's use of its treasury funds is prohibited by § 441b, but that § 441b is unconstitutional as applied to the activity of which the Federal Election Commission (FEC or Commission) complains.

I

A

MCFL was incorporated in January 1973 as a nonprofit, nonstock corporation under Massachusetts law. Its corporate purpose as stated in its articles of incorporation is:

> "To foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities and in

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Featherstone and *Richard E. Gardiner;* and for Joseph M. Scheidler et al. by *Edward R. Grant* and *Maura K. Quinlan.*

Jane E. Kirtley, David Barr, Nancy H. Hendry, J. Laurent Scharff, and *Bruce W. Sanford* filed a brief for the Reporters Committee for Freedom of the Press et al. as *amici curiae.*

addition to engage in any other lawful act or activity for which corporations may be organized . . . ." App. 84.

MCFL does not accept contributions from business corporations or unions. Its resources come from voluntary donations from "members," and from various fundraising activities such as garage sales, bake sales, dances, raffles, and picnics. The corporation considers its "members" those persons who have either contributed to the organization in the past or indicated support for its activities.[1]

Appellee has engaged in diverse educational and legislative activities designed to further its agenda. It has organized an ecumenical prayer service for the unborn in front of the Massachusetts Statehouse; sponsored a regional conference to discuss the issues of abortion and euthanasia; provided speakers for discussion groups, debates, lectures, and media programs; and sponsored an annual March for Life. In addition, it has drafted and submitted legislation, some of which has become law in Massachusetts; sponsored testimony on proposed legislation; and has urged its members to contact their elected representatives to express their opinion on legislative proposals.

MCFL began publishing a newsletter in January 1973. It was distributed as a matter of course to contributors, and, when funds permitted, to noncontributors who had expressed support for the organization. The total distribution of any one issue has never exceeded 6,000. The newsletter was published irregularly from 1973 through 1978: three times in 1973, five times in 1974, eight times in 1975, eight times in 1976, five times in 1977, and four times in 1978. *Id.*, at 88.

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[1] MCFL concedes that under this Court's decision in *FEC* v. *National Right to Work Committee*, 459 U. S. 197 (1982), such a definition does not permit it to solicit contributions from such persons for use by a separate segregated fund established under the Act. That case held that in order to be considered a "member" of a nonstock corporation under the Act, one must have "some relatively enduring and independently significant financial or organizational attachment" to the corporation. *Id.*, at 204.

Each of the newsletters bore a masthead identifying it as the "Massachusetts Citizens for Life Newsletter," as well as a volume and issue number. The publication typically contained appeals for volunteers and contributions and information on MCFL activities, as well as on matters such as the results of hearings on bills and constitutional amendments, the status of particular legislation, and the outcome of referenda, court decisions, and administrative hearings. Newsletter recipients were usually urged to contact the relevant decisionmakers and express their opinion.

B

In September 1978, MCFL prepared and distributed a "Special Edition" prior to the September 1978 primary elections. While the May 1978 newsletter had been mailed to 2,109 people and the October 1978 newsletter to 3,119 people, more than 100,000 copies of the "Special Edition" were printed for distribution. The front page of the publication was headlined "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and readers were admonished that "[n]o pro-life candidate can win in November without your vote in September." "VOTE PRO-LIFE" was printed in large bold-faced letters on the back page, and a coupon was provided to be clipped and taken to the polls to remind voters of the name of the "pro-life" candidates. Next to the exhortation to vote "pro-life" was a disclaimer: "This special election edition does not represent an endorsement of any particular candidate." *Id.*, at 101.

To aid the reader in selecting candidates, the flyer listed the candidates for each state and federal office in every voting district in Massachusetts, and identified each one as either supporting or opposing what MCFL regarded as the correct position on three issues. A "y" indicated that a candidate supported the MCFL view on a particular issue and an "n" indicated that the candidate opposed it. An asterisk was placed next to the names of those incumbents who had made

a "special contribution to the unborn in maintaining a 100% pro-life voting record in the state house by actively supporting MCFL legislation." While some 400 candidates were running for office in the primary, the "Special Edition" featured the photographs of only 13. These 13 had received a triple "y" rating, or were identified either as having a 100% favorable voting record or as having stated a position consistent with that of MCFL. No candidate whose photograph was featured had received even one "n" rating.

The "Special Edition" was edited by an officer of MCFL who was not part of the staff that prepared the MCFL newsletters. The "Special Edition" was mailed free of charge and without request to 5,986 contributors, and to 50,674 others whom MCFL regarded as sympathetic to the organization's purposes. The Commission asserts that the remainder of the 100,000 issues were placed in public areas for general distribution, but MCFL insists that no copies were made available to the general public.[2] The "Special Edition" was not identified on its masthead as a special edition of the regular newsletter, although the MCFL logotype did appear at its top. The words "Volume 5, No. 3, 1978" were apparently handwritten on the Edition submitted to the FEC, but the record indicates that the actual Volume 5, No. 3, was distributed in May and June 1977. The corporation spent $9,812.76 to publish and circulate the "Special Edition," all of which was taken from its general treasury funds.

A complaint was filed with the Commission alleging that the "Special Edition" was a violation of § 441b. The complaint maintained that the Edition represented an expenditure of funds from a corporate treasury to distribute to the general public a campaign flyer on behalf of certain political candidates. The FEC found reason to believe that such a

[2] The FEC submitted an affidavit from a person who stated that she obtained a copy of the "Special Edition" at a statewide conference of the National Organization for Women, where a stack of about 200 copies were available to the general public. App. 174.

violation had occurred, initiated an investigation, and determined that probable cause existed to believe that MCFL had violated the Act. After conciliation efforts failed, the Commission filed a complaint in the District Court under § 437g(a)(6)(A), seeking a civil penalty and other appropriate relief.

Both parties moved for summary judgment. The District Court granted MCFL's motion, holding that: (1) the election publications could not be regarded as "expenditures" under § 441b(b)(2); (2) the "Special Edition" was exempt from the statutory prohibition by virtue of § 431(9)(B)(i), which in general exempts news commentary distributed by a periodical publication unaffiliated with any candidate or political party; and (3) if the statute applied to MCFL, it was unconstitutional as a violation of the First Amendment. 589 F. Supp. 646, 649 (Mass. 1984).

On appeal, the Court of Appeals for the First Circuit held that the statute was applicable to MCFL, but affirmed the District Court's holding that the statute as so applied was unconstitutional. 769 F. 2d 13 (1985). We granted certiorari, 474 U. S. 1049 (1986), and now affirm.

II

We agree with the Court of Appeals that the "Special Edition" is not outside the reach of § 441b. First, we find no merit in appellee's contention that preparation and distribution of the "Special Edition" does not fall within that section's definition of "expenditure." Section 441b(b)(2) defines "contribution or expenditure" as the provision of various things of value "*to* any candidate, campaign committee, or political party or organization, in connection with any election . . ." (emphasis added). MCFL contends that, since it supplied nothing to any candidate or organization, the publication is not within § 441b. However, the general definitions section of the Act contains a broader definition of "expenditure," including within that term the provision of anything of value

made "*for the purpose of influencing* any election for Federal office . . . ." 2 U. S. C. § 431(9)(A)(i) (emphasis added). Since the language of the statute does not alone resolve the issue, we must look to the legislative history of § 441b to determine the scope of the term "expenditure."[3]

That history clearly confirms that § 441b was meant to proscribe expenditures in connection with an election. We have exhaustively recounted the legislative history of the predecessors of this section in prior decisions. See *Pipefitters* v. *United States*, 407 U. S. 385, 402–409 (1972); *United States* v. *Automobile Workers*, 352 U. S. 567, 570–587 (1957). This history makes clear that Congress has long regarded it as insufficient merely to restrict payments made directly to candidates or campaign organizations. The first explicit expression of this came in 1947, when Congress passed the Taft-Hartley Act, ch. 120, § 304, 61 Stat. 136, 159, as amended, 18 U. S. C. § 610 (1970 ed.), the criminal statute prohibiting corporate contributions and expenditures to candidates. The statute as amended forbade any corporation or labor organization to make a "contribution or expenditure in connection with any election . . ." for federal office. The 1946 Report of the House Special Committee to Investigate Campaign

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[3] MCFL argues that the definition in the general definitions section is not as broad as it appears, for § 431(9)(B)(v) says that nothing shall be considered an "expenditure" under § 431 that would not be regarded as such under § 441b(b). Therefore, MCFL argues, the definition of expenditure under § 431 necessarily incorporates § 441b's restriction of that term to payments *to* a candidate. It is puzzling, however, why § 431 would in one subsection purport to define an expenditure as a payment made for the purpose of influencing an election and in another subsection eliminate precisely that type of activity from the ambit of its definition. The answer may lie in the fact that § 441b(b)(2) says that expenditures "include" payments to a candidate, a term that indicates that activities not specifically enumerated in that section may nonetheless be encompassed by it. In any event, the need for such speculation signals that the language of the statute is not on its face dispositive.

Expenditures explained the rationale for the amendment, noting that it would undermine the basic objective of § 610

> "if it were assumed that the term 'making any contribution' related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?" H. R. Rep. No. 2739, 79th Cong., 2d Sess., 40, quoted in *Automobile Workers*, *supra*, at 581.

During the legislative debate on the bill, Senator Taft was asked whether § 610 permitted a newspaper published by a railway union to put out a special edition in support of a political candidate, or whether such activity would be considered a political expenditure. The Senator replied: "If it were supported by union funds contributed by union members as union dues it would be a violation of the law, yes. It is exactly as if a railroad itself, using its stockholders' funds, published such an advertisement in the newspaper supporting one candidate as against another . . . ." 93 Cong. Rec. 6436–6437 (1947).

United States v. *CIO*, 335 U. S. 106 (1948), narrowed the scope of this prohibition, by permitting the use of union funds to publish a special edition of the weekly CIO News distributed to union members and purchasers of the issue. In *Automobile Workers*, *supra*, however, we held that a union was subject to indictment for using union dues to sponsor political advertisements on commercial television. Distinguishing *CIO*, we stated that the concern of the statute "is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." 352 U. S., at 589.

The Federal Election Campaign Act enacted the prohibition now found in § 441b. This portion of the Act simply ratified the existing understanding of the scope of § 610. See

Pipefitters, *supra*, at 410–411. Representative Hansen, the sponsor of the provision, declared:

> "The effect of this language is to carry out the basic intent of section 610, which is to prohibit the use of union or corporate funds for active electioneering directed at the general public on behalf of a candidate in a Federal election." 117 Cong. Rec. 43379 (1971).

The Representative concluded:

> "The net effect of the amendment, therefore, is to tighten and clarify the provisions of section 610 of title 18, United States Code, and to codify the case law." *Ibid.*[4]

Thus, the fact that § 441b uses the phrase "to any candidate . . . in connection with any election," while § 610 provided "in connection with any primary election," is not evidence that Congress abandoned its restriction, in force since 1947, on expenditures on behalf of candidates. We therefore find no merit in MCFL's argument that only payments to a candidate or organization fall within the scope of § 441b.

Appellee next argues that the definition of an expenditure under § 441b necessarily incorporates the requirement that a communication "expressly advocate" the election of candidates, and that its "Special Edition" does not constitute express advocacy. The argument relies on the portion of *Buckley* v. *Valeo*, 424 U. S. 1 (1976), that upheld the disclosure requirement for expenditures by individuals other than candidates and by groups other than political committees. See 2 U. S. C. § 434(c). There, in order to avoid problems of overbreadth, the Court held that the term "expenditure" encompassed "only funds used for communications that expressly advocate the election or defeat of a clearly identified

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[4] See also 117 Cong. Rec. 43381 (1971) (remarks of Rep. Hays); *id.*, at 43383–43385 (remarks of Rep. Thompson); *id.*, at 43388–43389 (remarks of Reps. Steiger and Gude).

candidate." 424 U. S., at 80 (footnote omitted). The rationale for this holding was:

> "[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest." *Id.*, at 42 (footnote omitted).

We agree with appellee that this rationale requires a similar construction of the more intrusive provision that directly regulates independent spending. We therefore hold that an expenditure must constitute "express advocacy" in order to be subject to the prohibition of § 441b. We also hold, however, that the publication of the "Special Edition" constitutes "express advocacy."

Buckley adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of "express advocacy" depended upon the use of language such as "vote for," "elect," "support," etc., *Buckley*, *supra*, at 44, n. 52. Just such an exhortation appears in the "Special Edition." The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact. The "Special Edition" thus falls

squarely within § 441b, for it represents express advocacy of the election of particular candidates distributed to members of the general public.

Finally, MCFL argues that it is entitled to the press exemption under 2 U. S. C. § 431(9)(B)(i) reserved for

> "any news story, commentary, or editorial distributed through the facilities of any . . . newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."

MCFL maintains that its regular newsletter is a "periodical publication" within this definition, and that the "Special Edition" should be regarded as just another issue in the continuing newsletter series. The legislative history on the press exemption is sparse; the House of Representatives' Report on this section states merely that the exemption was designed to

> "make it plain that it is not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H. R. Rep. No. 93–1239, p. 4 (1974).

We need not decide whether the regular MCFL newsletter is exempt under this provision, because, even assuming that it is, the "Special Edition" cannot be considered comparable to any single issue of the newsletter. It was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters. It was not distributed to the newsletter's regular audience, but to a group 20 times the size of that audience, most of whom were members of the public who had never received the newsletter. No characteristic of the Edition associated it in any way with the normal MCFL publication. The MCFL

masthead did not appear on the flyer, and, despite an apparent belated attempt to make it appear otherwise, the Edition contained no volume and issue number identifying it as one in a continuing series of issues.

MCFL protests that determining the scope of the press exemption by reference to such factors inappropriately focuses on superficial considerations of form. However, it is precisely such factors that in combination permit the distinction of campaign flyers from regular publications. We regard such an inquiry as essential, since we cannot accept the notion that the distribution of such flyers by entities that happen to publish newsletters automatically entitles such organizations to the press exemption. A contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 441b's prohibition.[5]

In sum, we hold that MCFL's publication and distribution of the "Special Edition" is in violation of § 441b. We therefore turn to the constitutionality of that provision as applied to appellee.

III

A

Independent expenditures constitute expression "'at the core of our electoral process and of the First Amendment freedoms.'" *Buckley*, 424 U. S., at 39 (quoting *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968)). See also *FEC* v. *National Conservative Political Action Committee*, 470 U. S. 480, 493 (1985) *(NCPAC)* (independent expenditures "produce speech at the core of the First Amendment"). We must therefore

[5] Nor do we find the "Special Edition" akin to the normal business activity of a press entity deemed by some lower courts to fall within the exemption, such as the distribution of a letter soliciting subscriptions, see *FEC* v. *Phillips Publishing Co.*, 517 F. Supp. 1308, 1313 (DC 1981), or the dissemination of publicity, see *Reader's Digest Assn.* v. *FEC*, 509 F. Supp. 1210 (SDNY 1981).

determine whether the prohibition of § 441b burdens political speech, and, if so, whether such a burden is justified by a compelling state interest. *Buckley*, *supra*, at 44–45.

The FEC minimizes the impact of the legislation upon MCFL's First Amendment rights by emphasizing that the corporation remains free to establish a separate segregated fund, composed of contributions earmarked for that purpose by the donors, that may be used for unlimited campaign spending. However, the corporation is *not* free to use its general funds for campaign advocacy purposes. While that is not an absolute restriction on speech, it is a substantial one. Moreover, even to speak through a segregated fund, MCFL must make very significant efforts.

If it were not incorporated, MCFL's obligations under the Act would be those specified by § 434(c), the section that prescribes the duties of "[e]very person (other than a political committee)."[6] Section 434(c) provides that any such person that during a year makes independent expenditures exceeding $250 must: (1) identify all contributors who contribute in a given year over $200 in the aggregate in funds to influence elections, § 434(c)(1); (2) disclose the name and address of recipients of independent expenditures exceeding $200 in the aggregate, along with an indication of whether the money was used to support or oppose a particular candidate, § 434(c)(2)(A); and (3) identify any persons who make contributions over $200 that are earmarked for the purpose of furthering independent expenditures, § 434(c)(2)(C). All unincorporated organizations whose major purpose is not campaign advocacy, but who occasionally make independent ex-

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[6] In *Buckley* v. *Valeo*, 424 U. S. 1 (1976), this Court said that an entity subject to regulation as a "political committee" under the Act is one that is either "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.*, at 79. It is undisputed on this record that MCFL fits neither of these descriptions. Its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.

penditures on behalf of candidates, are subject only to these regulations.

Because it is incorporated, however, MCFL must establish a "separate segregated fund" if it wishes to engage in any independent spending whatsoever. §§ 441b(a),(b)(2)(C). Since such a fund is considered a "political committee" under the Act, § 431(4)(B), all MCFL independent expenditure activity is, as a result, regulated as though the organization's major purpose is to further the election of candidates. This means that MCFL must comply with several requirements in addition to those mentioned. Under § 432, it must appoint a treasurer, § 432(a); ensure that contributions are forwarded to the treasurer within 10 or 30 days of receipt, depending on the amount of contribution, § 432(b)(2); see that its treasurer keeps an account of every contribution regardless of amount, the name and address of any person who makes a contribution in excess of $50, all contributions received from political committees, and the name and address of any person to whom a disbursement is made regardless of amount, § 432(c); and preserve receipts for all disbursements over $200 and all records for three years, §§ 432(c),(d). Under § 433, MCFL must file a statement of organization containing its name, address, the name of its custodian of records, and its banks, safety deposit boxes, or other depositories, §§ 433(a),(b); must report any change in the above information within 10 days, § 433(c); and may dissolve only upon filing a written statement that it will no longer receive any contributions nor make disbursements, and that it has no outstanding debts or obligations, § 433(d)(1).

Under § 434, MCFL must file either monthly reports with the FEC or reports on the following schedule: quarterly reports during election years, a pre-election report no later than the 12th day before an election, a postelection report within 30 days after an election, and reports every 6 months during nonelection years, §§ 434(a)(4)(A),(B). These reports must contain information regarding the amount of cash on

hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation. § 434(b). In addition, MCFL may solicit contributions for its separate segregated fund only from its "members," §§ 441b(b)(4)(A), (C), which does not include those persons who have merely contributed to or indicated support for the organization in the past. See *FEC* v. *National Right to Work Committee*, 459 U. S. 197, 204 (1982).

It is evident from this survey that MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated. These additional regulations may create a disincentive for such organizations to engage in political speech. Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear.[7] Furthermore, such duties require a far more com-

[7] It is true that we acknowledged in *Buckley*, *supra*, that, although the reporting and disclosure requirements of the Act "will deter some individuals who otherwise might contribute," *id.*, at 68, this is a burden that is justified by substantial Government interests. *Id.*, at 66–68. However, while the effect of additional reporting and disclosure obligations on an organization's *contributors* may not necessarily constitute an additional burden on speech, the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak.

plex and formalized organization than many small groups could manage. Restriction of solicitation of contributions to "members" vastly reduces the sources of funding for organizations with either few or no formal members, directly limiting the ability of such organizations to engage in core political speech. It is not unreasonable to suppose that, as in this case, an incorporated group of like-minded persons might seek donations to support the dissemination of their political ideas and their occasional endorsement of political candidates, by means of garage sales, bake sales, and raffles. Such persons might well be turned away by the prospect of complying with all the requirements imposed by the Act. Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.[8]

Thus, while § 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize § 441b as an infringement on First Amendment activities. In *Freedman* v. *Maryland*, 380 U. S. 51 (1965), for instance, we held that the absence of certain procedural safeguards rendered unconstitutional a State's film censorship program. Such procedures were necessary, we said, because, as a practical matter, without them "it may prove too burdensome to seek review of the censor's determination." *Id.*, at 59.

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[8] The fact that MCFL established a political committee in 1980 does not change this conclusion, for the corporation's speech may well have been inhibited due to its inability to form such an entity before that date. Furthermore, other organizations comparable to MCFL may not find it feasible to establish such a committee, and may therefore decide to forgo engaging in independent political speech.

Speiser v. *Randall*, 357 U. S. 513 (1958), reviewed a state program under which taxpayers applying for a certain tax exemption bore the burden of proving that they did not advocate the overthrow of the United States and would not support a foreign government against this country. We noted: "In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free." *Id.*, at 526. The same may be said of § 441b, for its practical effect on MCFL in this case is to make engaging in protected speech a severely demanding task.[9]

B

When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest. *Williams* v. *Rhodes*, 393 U. S., at 31; *NAACP* v. *Button*, 371 U. S. 415, 438 (1963). The FEC first insists that justification for § 441b's expenditure restriction is provided by this Court's acknowledgment that "the special characteristics of the corporate structure require particularly careful regulation." *National Right to Work Committee, supra*, at 209–210. The Commission thus relies on the long history of regulation of corporate political activity as support for the application of § 441b to MCFL. Evaluation of the Commis-

[9] The Commission relies on *Regan* v. *Taxation With Representation*, 461 U. S. 540 (1983), in support of its contention that the requirement that independent spending be conducted through a separate segregated fund does not burden MCFL's First Amendment rights. *Regan*, however, involved the requirement that a nonprofit corporation establish a separate lobbying entity if contributions to the corporation for the conduct of other activities were to be tax deductible. If the corporation chose not to set up such a lobbying arm, it would not be eligible for tax-deductible contributions. Such a result, however, would infringe no protected activity, for there is no right to have speech subsidized by the Government. *Id.*, at 545–546. By contrast, the activity that may be discouraged in this case, independent spending, is core political speech under the First Amendment.

sion's argument requires close examination of the underlying rationale for this longstanding regulation.

We have described that rationale in recent opinions as the need to restrict "the influence of political war chests funneled through the corporate form," *NCPAC*, 470 U. S., at 501; to "eliminate the effect of aggregated wealth on federal elections," *Pipefitters*, 407 U. S., at 416; to curb the political influence of "those who exercise control over large aggregations of capital," *Automobile Workers*, 352 U. S., at 585; and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," *National Right to Work Committee*, 459 U. S., at 207.

This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas. It acknowledges the wisdom of Justice Holmes' observation that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).[10]

Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. Political "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. See *NCPAC*, *supra* (invali-

[10] While this market metaphor has guided congressional regulation in the area of campaign activity, First Amendment speech is not necessarily limited to such an instrumental role. As Justice Brandeis stated in his discussion of political speech in his concurrence in *Whitney* v. *California*, 274 U. S. 357, 375 (1927):

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means."

dating limits on independent spending by political committees); *Buckley*, 424 U. S., at 39–51 (striking down expenditure limits in 1971 Campaign Act). Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

By requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace. The resources available to *this* fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee. *Pipefitters*, *supra*, acknowledged this objective of § 441b in noting the statement of Representative Hansen, its sponsor, that the "'underlying theory'" of this regulation "'is that substantial general purpose treasuries should not be diverted to political purposes,'" and that requiring funding by voluntary contributions would ensure that "'the money collected is that intended by those who contribute to be used for political purposes and not money diverted from another source.'" 407 U. S., at 423–424 (quoting 117 Cong. Rec. 43381 (1971)).[11] See also *Automobile Workers*, *supra*, at 582

[11] While business corporations may not represent the only organizations that pose this danger, they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth. That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations. Rather, Congress' decision represents the "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,'" to which we have said we owe considerable deference. *FEC* v. *National Right to Work Committee*, 459 U. S. 197, 209

(Congress added proscription on expenditures to Corrupt Practices Act "to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power"). The expenditure restrictions of § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas.

Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes.[12] Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise. In short, MCFL is not the type of "traditional corporatio[n] organized for economic gain," *NCPAC*, *supra*, at 500, that has been the focus of regulation of corporate political activity.

National Right to Work Committee does not support the inclusion of MCFL within § 441b's restriction on direct independent spending. That case upheld the application to a nonprofit corporation of a different provision of § 441b: the limitation on who can be solicited for contributions to a political committee. However, the political activity at issue in that case was contributions, as the committee had been established for the purpose of making direct contributions to political candidates. 459 U. S., at 200. We have consistently held that restrictions on contributions require less com-

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(1982) (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46 (1937)).

[12] The regulation imposed as a result of this concern is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978).

pelling justification than restrictions on independent spending. *NCPAC*, 470 U. S. 480 (1985); *California Medical Assn.* v. *FEC*, 453 U. S. 182, 194, 196–197 (1981); *Buckley*, *supra*, at 20–22.

In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in *National Right to Work Committee* to support a limitation on the ability of a committee to raise money for direct contributions to candidates. The limitation on solicitation in this case, however, means that nonmember corporations can hardly raise any funds at all to engage in political speech warranting the highest constitutional protection. Regulation that would produce such a result demands far more precision than § 441b provides. Therefore, the desirability of a broad prophylactic rule cannot justify treating alike business corporations and appellee in the regulation of independent spending.

The Commission next argues in support of § 441b that it prevents an organization from using an individual's money for purposes that the individual may not support. We acknowledged the legitimacy of this concern as to the dissenting stockholder and union member in *National Right to Work Committee*, 459 U. S., at 208, and in *Pipefitters*, 407 U. S., at 414–415. But such persons, as noted, contribute investment funds or union dues for economic gain, and do not necessarily authorize the use of their money for political ends. Furthermore, because such individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union. It was thus wholly reasonable for Congress to require the establishment of a separate political fund to which persons can make voluntary contributions.

This rationale for regulation is not compelling with respect to independent expenditures by appellee. Individuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support

those purposes. It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor. In addition, an individual desiring more direct control over the use of his or her money can simply earmark the contribution for a specific purpose, an option whose availability does not depend on the applicability of § 441b. Cf. § 434(c)(2)(C) (entities other than political committees must disclose names of those persons making earmarked contributions over $200). Finally, a contributor dissatisfied with how funds are used can simply stop contributing.

The Commission maintains that, even if contributors may be aware that a contribution to appellee will be used for political purposes in general, they may not wish such money to be used for electoral campaigns in particular. That is, persons may desire that an organization use their contributions to further a certain cause, but may not want the organization to use their money to urge support for or opposition to political candidates solely on the basis of that cause. This concern can be met, however, by means far more narrowly tailored and less burdensome than § 441b's restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose.

It is true that *National Right to Work Committee, supra,* held that the goal of protecting minority interests justified solicitation restrictions on a nonprofit corporation operating a political committee established to make direct contributions to candidates. As we have noted above, however, the Government enjoys greater latitude in limiting contributions

than in regulating independent expenditures. *Supra*, at 259–260. Given a contributor's awareness of the political activity of appellee, as well as the readily available remedy of refusing further donations, the interest protecting contributors is simply insufficient to support § 441b's restriction on the independent spending of MCFL.

Finally, the FEC maintains that the inapplicability of § 441b to MCFL would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions. We see no such danger. Even if § 441b is inapplicable, an independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). As a result, MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act.

Furthermore, should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley*, 424 U. S., at 79. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns. In sum, there is no need for the sake of disclosure to treat MCFL any differently than other organizations that only occasionally engage in independent spending on behalf of candidates.

Thus, the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL. The dissent is surely correct in maintaining that we should not second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not kind. *Post*, at 268–269. It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all. Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form. Given this fact, the rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom. While the burden on MCFL's speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification. In so holding, we do not assume a legislative role, but fulfill our judicial duty—to enforce the demands of the Constitution.

C

Our conclusion is that § 441b's restriction of independent spending is unconstitutional as applied to MCFL, for it infringes protected speech without a compelling justification for such infringement. We acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace.

Regardless of whether that concern is adequate to support application of § 441b to commercial enterprises, a question not before us, that justification does not extend uniformly to all corporations. Some corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status.

In particular, MCFL has three features essential to our holding that it may not constitutionally be bound by § 441b's

restriction on independent spending. *First*, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity.[13] *Third*, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.

It may be that the class of organizations affected by our holding today will be small. That prospect, however, does not diminish the significance of the rights at stake. Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U. S. 319, 327 (1937). Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would

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[13] This restriction does not deprive such organizations of "members" that can be solicited for donations to a separate segregated fund that makes contributions to candidates, a fund that, under our decision in *National Right to Work Committee*, must be established by all corporations wishing to make such candidate contributions. *National Right to Work Committee* requires that "members" have either a "financial or *organizational* attachment" to the corporation, 459 U. S., at 204 (emphasis added). Our decision today merely states that a corporation that does not have persons affiliated *financially* must fall outside § 441b's prohibition on direct expenditures if it also has the other two characteristics possessed by MCFL that we discuss in text.

be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation. In enacting the provision at issue in this case, Congress has chosen too blunt an instrument for such a delicate task.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join Parts I, II, III–B, and III–C, and I concur in the Court's judgment that §316 of the Federal Election Campaign Act (Act), 2 U. S. C. §441b, is unconstitutional as applied to the conduct of appellee Massachusetts Citizens for Life, Inc. (MCFL), at issue in this case. I write separately, however, because I am concerned that the Court's discussion of the Act's disclosure requirements may be read as moving away from the teaching of *Buckley* v. *Valeo*, 424 U. S. 1 (1976); see *ante*, at 254–255. In *Buckley*, the Court was concerned not only with the chilling effect of reporting and disclosure requirements on an organization's contributors, 424 U. S., at 66–68, but also with the potential burden of disclosure requirements on a group's own speech. *Id.*, at 74–82. The *Buckley* Court concluded that disclosure of a group's independent campaign expenditures serves the important governmental interest of "shed[ding] the light of publicity" on campaign financing, thereby helping voters to evaluate the constituencies of those who seek federal office. *Id.*, at 81. As a result, the burden of disclosing independent expenditures generally is "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.*, at 82.

In my view, the significant burden on MCFL in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act. As the Court has described *ante*, at 253–255, engaging in campaign speech requires MCFL to assume a more formalized organizational form and significantly reduces or eliminates the sources of funding for groups such as MCFL with few or no "members." These additional requirements do not further the Government's informational interest in campaign disclosure, and, for the reasons given by the Court, cannot be justified by any of the other interests identified by the Federal Election Commission. Although the organizational and solicitation restrictions are not invariably an insurmountable burden on speech, see, *e. g.*, *FEC* v. *National Right to Work Committee*, 459 U. S. 197 (1982), in this case the Government has failed to show that groups such as MCFL pose any danger that would justify infringement of its core political expression. On that basis, I join in the Court's judgment that § 441b is unconstitutional as applied to MCFL.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part and dissenting in part.

In *FEC* v. *National Right to Work Committee*, 459 U. S. 197, 209–210 (1982) *(NRWC)*, the Court unanimously endorsed the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." I continue to believe that this judgment, as reflected in 2 U. S. C. § 441b, is constitutionally sound and entitled to substantial deference, and therefore dissent from the Court's decision to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.*, at 210. Though I agree that the expenditures in this case violated the terms of § 441b, and accordingly join Parts I and II of the Court's opinion, I cannot accept the conclusion that the statutory provisions are uncon-

stitutional as applied to appellee Massachusetts Citizens for Life (MCFL).

As the Court recognizes, the segregated fund requirements of § 441b are simply a contemporary chapter in the "long history of regulation of corporate political activity." *Ante*, at 256. See *NRWC*, *supra*, at 208–209; *United States* v. *Automobile Workers*, 352 U. S. 567, 570–584 (1957). In approving this sort of regulation, our decisions have found at least two legitimate concerns arising from corporate campaign spending. First, § 441b and its predecessors were enacted to rid the political process of the corruption and appearance of corruption that accompany contributions to and expenditures for candidates from corporate funds. See *NRWC*, *supra*, at 207–208; *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 788, n. 26 (1978); *Automobile Workers*, *supra*, at 570–575. Second, such regulation serves to protect the interests of individuals who pay money into a corporation or union for purposes other than the support of candidates for public office. See *NRWC*, *supra*, at 208; *Pipefitters* v. *United States*, 407 U. S. 385, 414–415 (1972); *United States* v. *CIO*, 335 U. S. 106, 113 (1948). In light of the "special advantages that the State confers on the corporate form," *FEC* v. *National Conservative Political Action Committee*, 470 U. S. 480, 495 (1985) *(NCPAC)*, we have considered these dangers sufficient to justify restrictions on corporate political activity. See also *California Medical Assn.* v. *FEC*, 453 U. S. 182, 201 (1981).

The Court, rejecting the "teachings of our earlier decisions," *NRWC*, *supra*, at 210, and the judgment of Congress,[1] confidently concludes that these dangers are not

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[1] It is, of course, clear that Congress intended § 441b to apply to corporations like MCFL. The section makes it unlawful for "*any corporation* . . . to make a contribution or expenditure in connection with" certain federal elections. 2 U. S. C. § 441b(a) (emphasis added). Other provisions of the statutory scheme make clear that corporations "without capital stock" are within the regulatory sphere. See § 441b(b)(4)(C). This is accordingly

present here. "Groups such as MCFL," the Court assures us, do not pose "the potential for unfair deployment of wealth for political purposes." *Ante*, at 259. Because MCFL was formed to disseminate political ideas, we are told, the money it spends—at least in the form of independent expenditures—reflects the political ideas for which it stands without the threat or appearance of corruption. *Ante*, at 258–260. Nor does the Court find any need to protect the interests of contributors to MCFL by requiring the establishment of a separate segregated fund for its political expenditures. Individual contributors can simply withhold their contributions if they disagree with the corporation's choices; those who continue to give will be protected by requiring notice to them that their money might be used for political purposes. *Ante*, at 261–262.

I do not dispute that the threat from corporate political activity will vary depending on the particular characteristics of a given corporation; it is obvious that large and successful corporations with resources to fund a political war chest constitute a more potent threat to the political process than less successful business corporations or nonprofit corporations. It may also be that those supporting some nonbusiness corporations will identify with the corporations' political views more frequently than the average shareholder of General Motors would support the political activities of that corporation. These distinctions among corporations, however, are "distinctions in degree" that do not amount to "differences in kind." *Buckley* v. *Valeo*, 424 U. S. 1, 30 (1976) *(per curiam)*. Cf. *NCPAC*, *supra*, at 498–499. As such, they are more properly drawn by the Legislature than by the Judiciary. See *Buckley*, *supra*, at 30. Congress expressed its judgment in § 441b that the threat posed by corporate political activity warrants a prophylactic measure applicable to all

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not a case of statutory construction, but rather one in which the Court rejects the judgment of Congress that such regulation is appropriate. Cf. *United States* v. *CIO*, 335 U. S. 106 (1948).

groups that organize in the corporate form. Our previous cases have expressed a reluctance to fine-tune such judgments; I would adhere to that counsel here.

I would have thought the distinctions drawn by the Court today largely foreclosed by our decision in *NRWC, supra.* We considered there the requirement of § 441b(b)(4)(C) that separate segregated funds solicit only from "members." The corporation whose fund was at issue was not unlike MCFL—a nonprofit corporation without capital stock, formed to educate the public on an issue of perceived public significance. See *NRWC*, 459 U. S., at 199–200. We were asked to adopt a broad definition of members because the solicitations involved "would neither corrupt officials nor coerce members of the corporation holding minority political views . . . ." *Id.*, at 206. We had no difficulty concluding that such an approach was unnecessary and that the judgment of Congress to regulate corporate political activity was entitled to "considerable deference." *Id.*, at 209. Most significantly, we declined the invitation to modify the statute to account for the characteristics of different corporations: "While § 441b restricts the solicitation of corporations and labor unions without great resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.*, at 210. We saw no reason why the governmental interest in preventing both actual corruption and the appearance of corruption could not "be accomplished by treating unions, corporations, and similar organizations differently from individuals." *Id.*, at 210–211.

The distinction between corporate and noncorporate activity was not diminished in *NCPAC, supra,* where we found fatally overbroad the $1,000 limitation in 26 U. S. C. § 9012(f) on independent expenditures by "political committees." Our conclusion rested in part on the fact that § 9012(f) regulated

not only corporations but rather "indiscriminately lump[ed] with corporations any 'committee, association or organization.'" *NCPAC*, 470 U. S., at 500. *NCPAC* accordingly continued to recognize what had been, until today, an acceptable distinction, grounded in the judgment of the political branch, between political activity by corporate actors and that by organizations not benefiting from "the corporate shield which the State [has] granted to corporations as a form of *quid pro quo*" for various regulations. *Citizens Against Rent Control* v. *Berkeley*, 454 U. S. 290, 300 (1981) (REHNQUIST, J., concurring).[2]

The Court explains the decisions in *NRWC* and *NCPAC* by reference to another distinction found in our decisions—that between contributions and independent expenditures. See *Buckley*, *supra*, at 19–23. This is admittedly a distinction between the facts of *NRWC* and those of *NCPAC*, but it does not warrant a different result in view of our longstanding approval of limitations on corporate spending and of the type of regulation involved here. The distinction between contributions and independent expenditures is not a line separating black from white. The statute here—though involving independent expenditures—is not nearly so drastic as the "wholesale restriction of clearly protected conduct" at issue in *NCPAC*, *supra*, at 501. It regulates instead the *form* of otherwise unregulated spending. A separate segregated fund formed by MCFL may use contributions it receives, without limit, on political expenditures.[3] As the Court cor-

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[2] Only once have we found unconstitutional a regulation that restricted only corporate political activity. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978). As we noted in *FEC* v. *National Right to Work Committee*, 459 U. S. 197, 210, n. 7 (1982), our decision in *Bellotti* did not consider the validity of laws, like § 441b, aimed at the threat of corruption in *candidate elections*. See *Bellotti*, *supra*, at 788, n. 26.

[3] Because the corporation itself may use its own treasury money to pay the fund's administrative costs and to solicit contributions to the fund, 2 U. S. C. § 441b(b)(4), every dollar of those contributions is available for political purposes.

rectly notes, the regulation of § 441b is not without burdens, but it remains wholly different in character from that which we condemned in *NCPAC*. In these circumstances, I would defer to the congressional judgment that corporations are a distinct category with respect to which this sort of regulation is constitutionally permissible.[4]

The basically legislative character of the Court's decision is dramatically illustrated by its effort to carve out a constitutional niche for "[g]roups such as MCFL." *Ante*, at 259. The three-part test gratuitously announced in today's dicta, *ante*, at 263–264, adds to a well-defined prohibition a vague and barely adumbrated exception certain to result in confusion and costly litigation. If we sat as a council of revision to modify legislative judgments, I would hesitate to join the Court's effort because of this fact alone. But we do not sit in that capacity; we are obliged to leave the drawing of lines in cases such as this to Congress if those lines are within constitutional bounds. Believing that the Act of Congress in question here passes this test, I dissent from the Court's contrary conclusion.

JUSTICE WHITE, while joining THE CHIEF JUSTICE's opinion, adheres to his dissenting views expressed in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), *First National Bank* v. *Bellotti*, 435 U. S. 765 (1978), and *FEC* v. *National Conservative Political Action Committee*, 470 U. S. 480 (1985).

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[4] The statutory scheme at issue in this case does not require us to consider the validity of a direct and absolute limitation on independent expenditures by corporations.

CALIFORNIA FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* GUERRA, DIRECTOR, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–494. Argued October 8, 1986—Decided January 13, 1987

The California Fair Employment and Housing Act in § 12945(b)(2) requires employers to provide leave and reinstatement to employees disabled by pregnancy. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex, as amended by the Pregnancy Discrimination Act (PDA), specifies that sex discrimination includes discrimination on the basis of pregnancy. A woman employed as a receptionist by petitioner California Federal Savings & Loan Association (Cal Fed) took a pregnancy disability leave in 1982, but when she notified Cal Fed that she was able to return to work she was informed that her job had been filled and that there were no similar positions available. She then filed a complaint with respondent Department of Fair Employment and Housing, which charged Cal Fed with violating § 12945(b)(2). Before a hearing was held on the complaint, Cal Fed, joined by the other petitioners, brought an action in Federal District Court, seeking a declaration that § 12945(b)(2) is inconsistent with and pre-empted by Title VII and an injunction against its enforcement. The District Court granted summary judgment for petitioners, but the Court of Appeals reversed.

Held: The judgment is affirmed.

758 F. 2d 390, affirmed.

JUSTICE MARSHALL delivered the opinion of the Court with respect to Parts I, II, III–B, III–C, and IV, concluding that § 12945(b)(2) is not pre-empted by Title VII, as amended by the PDA, because it is not inconsistent with the purposes of Title VII nor does it require the doing of an act that is unlawful under Title VII. Pp. 284–292.

(a) Title VII's purpose is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430. Rather than limiting Title VII principles and objectives, the PDA extends them to cover pregnancy. Section 12945(b)(2) also promotes equal employment opportunity. By requiring employers to reinstate women after a reasonable

pregnancy disability leave, it ensures that they will not lose their jobs on account of pregnancy. Pp. 284–290.

(b) Section 12945(b)(2) does not prevent employers from complying with both the federal law (as construed by petitioners to reject California's "special treatment" approach to pregnancy discrimination and to forbid an employer to treat pregnant employees any differently than other disabled employees) and the state law. This is not a case where compliance with both the federal and state laws is a physical impossibility. Section 12945(b)(2) does not compel employers to treat pregnant employees *better* than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers. Pp. 290–292.

JUSTICE MARSHALL, joined by JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE O'CONNOR, concluded in Part III–A that both §§ 708 and 1104 of the Civil Rights Act of 1964 severely limit Title VII's pre-emptive effect by leaving state fair employment laws where they were before Title VII was enacted. Pp. 280–284.

JUSTICE STEVENS concluded that, for purposes of holding that § 12945 (b)(2) is not pre-empted by Title VII, it is not necessary to reach the question whether § 1104 applies to Title VII or whether § 708 is the only provision governing Title VII's pre-emptive scope. Pp. 292–293, n. 1.

JUSTICE SCALIA concluded that the only provision whose effect on pre-emption need be considered is § 708 of Title VII, which prohibits pre-emption unless a state law requires or permits the doing of an act outlawed by the PDA. Because § 12945(b)(2) does not require or permit the doing of an act outlawed under any interpretation of the PDA, it is not pre-empted. Accordingly it is unnecessary to decide how the PDA should be interpreted. Pp. 295–296.

MARSHALL, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–B, III–C, and IV, in which BRENNAN, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Part III–A, in which BRENNAN, BLACKMUN, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 292. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 295. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and POWELL, J., joined, *post*, p. 297.

Theodore B. Olson argued the cause for petitioners. With him on the briefs were *Willard Z. Carr, Jr.*, *Pamela L. Hemminger*, *Paul Blankenstein*, and *Jan E. Eakins*.

Marian M. Johnston, Deputy Attorney General of California, argued the cause for respondents. With her on the brief were *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, and *M. Anne Jennings* and *Beverly Tucker*, Deputy Attorneys General.*

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, pre-empts a state statute that re-

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Geller*, *Deputy Assistant Attorney General Carvin*, *Richard J. Lazarus*, *Brian K. Landsberg*, *David K. Flynn*, and *Mary E. Mann*; and for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Lorence L. Kessler*.

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut et al. by *Joseph I. Lieberman*, Attorney General of Connecticut, *Clarine Nardi Riddle*, Deputy Attorney General, *Brian J. Comerford*, Assistant Attorney General, *Philip A. Murphy, Jr.*, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Michael Greely*, Attorney General of Montana, and *Kenneth O. Eikenberry*, Attorney General of Washington; for the American Federation of Labor and Congress of Industrial Organizations by *Laurence Gold* and *Marsha S. Berzon*; for California Women Lawyers et al. by *Cheryl Houser*, *Janet M. Koehn*, and *Lorraine L. Loder*; for Equal Rights Advocates et al. by *Judith E. Kurtz*, *Nancy L. Davis*, and *Herma Hill Kay*; for Human Rights Advocates et al. by *Richard F. Ziegler* and *Andrew Weissmann*; for the National Conference of State Legislatures et al. by *Benna Ruth Solomon*, *Todd D. Peterson*, and *Barbara E. Etkind*; and for Lillian Garland by *Joan M. Graff*, *Robert Barnes*, and *Patricia Shiu*.

Briefs of *amici curiae* were filed for the American Civil Liberties Union et al. by *Joan E. Bertin*, *Isabelle Katz Pinzler*, *George Kannar*, and *Charles S. Sims*; for the Chamber of Commerce of the United States by *Robin S. Conrad*; for the Coalition for Reproductive Equality in the Workplace et al. by *Christine Anne Littleton* and *Judith Resnik*; and for the National Organization for Women et al. by *Susan Deller Ross*, *Sarah E. Burns*, and *Wendy Webster Williams*.

quires employers to provide leave and reinstatement to employees disabled by pregnancy.

I

California's Fair Employment and Housing Act (FEHA), Cal. Gov't Code Ann. § 12900 *et seq.* (West 1980 and Supp. 1986), is a comprehensive statute that prohibits discrimination in employment and housing. In September 1978, California amended the FEHA to proscribe certain forms of employment discrimination on the basis of pregnancy. See Cal. Labor Code Ann. § 1420.35, 1978 Cal. Stats., ch. 1321, § 1, pp. 4320–4322 (West Supp. 1979), now codified at Cal. Gov't Code Ann. § 12945(b)(2) (West 1980).[1] Subdivision (b)(2)—the provision at issue here—is the only portion of the statute that applies to employers subject to Title VII. See

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[1] Section 12945(b)(2) provides, in relevant part:

"It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

. . . . . .

"(b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . . .

. . . . . .

"(2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions. . . .

"An employer may require any employee who plans to take a leave pursuant to this section to give reasonable notice of the date such leave shall commence and the estimated duration of such leave."

Originally, the statute was intended to reverse, as to California employers, the rule established by this Court's decision in *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976). At the time, California law prohibited school districts from discriminating on the basis of pregnancy, see former Cal. Labor Code Ann. § 1420.2 (1977), now codified at Cal. Gov't Code Ann. § 12943 (West 1980). The first version of § 12945 simply imposed this requirement on all California employers with five or more employees. As a result of employer opposition, however, the measure was changed to its present form.

§ 12945(e).[2] It requires these employers to provide female employees an unpaid pregnancy disability leave of up to four months. Respondent Fair Employment and Housing Commission, the state agency authorized to interpret the FEHA,[3] has construed § 12945(b)(2) to require California employers to reinstate an employee returning from such pregnancy leave to the job she previously held, unless it is no longer available due to business necessity. In the latter case, the employer must make a reasonable, good-faith effort to place the employee in a substantially similar job.[4] The statute does not compel employers to provide *paid* leave to pregnant employees. Accordingly, the only benefit pregnant workers actually derive from § 12945(b)(2) is a qualified right to reinstatement.

Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, also prohibits various forms of employment

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[2] Aware that legislation on this subject was pending before Congress, the state legislature added the following section:

"In the event Congress enacts legislation amending Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy, the provisions of this act, except paragraph (2) of subdivision (b) . . . shall be inapplicable to any employer subject to such federal law . . . ." 1978 Cal. Stats., ch. 1321, § 4, p. 4322.

When Congress passed the Pregnancy Discrimination Act of 1978, this section rendered the state law, except subdivision (b)(2), invalid as applied to all employers covered by Title VII. California subsequently adopted subdivision (e), which provides:

"The provisions of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964."

[3] See Cal. Gov't Code Ann. §§ 12935(a)(1) and 12935(h) (West 1980). Respondent Department of Fair Employment and Housing is the state agency charged with enforcing the FEHA. See § 12930.

[4] The parties have stipulated that the Commission's interpretation of § 12945(b)(2) is set forth in its proposed regulation as reproduced in App. 47. See also *Matter of Accusation of Department of Fair Employment and Housing* v. *Travel Express*, Case No. FEP 80–81 A7–0992s N18709 83–17 (Aug. 4, 1983) (precedential Commission decision construing § 12945 (b)(2)).

discrimination, including discrimination on the basis of sex. However, in *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), this Court ruled that discrimination on the basis of pregnancy was not sex discrimination under Title VII.[5] In response to the *Gilbert* decision, Congress passed the Pregnancy Discrimination Act of 1978 (PDA), 42 U. S. C. § 2000e(k). The PDA specifies that sex discrimination includes discrimination on the basis of pregnancy.[6]

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[5] In *General Electric Co.* v. *Gilbert*, the Court held that an otherwise comprehensive disability insurance plan did not violate Title VII because it failed to cover pregnancy-related disabilities. Relying on *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), which upheld a similar plan against a Fourteenth Amendment equal protection challenge, the Court concluded that removing pregnancy from the list of compensable disabilities was not discrimination on the basis of sex. 429 U. S., at 133–136. The Court further held that "[a]s there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme . . . ." *Id.*, at 138.

Three Members of the Court dissented. See *id.*, at 146 (opinion of BRENNAN, J., joined by MARSHALL, J.); *id.*, at 160 (opinion of STEVENS, J.). The dissenting Justices would have held that the employer's disability plan discriminated on the basis of sex by giving men protection for all categories of risk but giving women only partial protection.

In *Nashville Gas Co.* v. *Satty*, 434 U. S. 136, 143–146 (1977), the Court relied on *Gilbert* to uphold an employer's sick-leave policy that excluded pregnancy.

[6] The PDA added subsection (k) to § 701, the definitional section of Title VII. Subsection (k) provides, in relevant part:

"The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise."

The legislative history of the PDA reflects Congress' approval of the views of the dissenters in *Gilbert*. See *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678–679, and nn. 15–17 (1983) (citing legislative history).

II

Petitioner California Federal Savings & Loan Association (Cal Fed) is a federally chartered savings and loan association based in Los Angeles; it is an employer covered by both Title VII and § 12945(b)(2). Cal Fed has a facially neutral leave policy that permits employees who have completed three months of service to take unpaid leaves of absence for a variety of reasons, including disability and pregnancy. Although it is Cal Fed's policy to try to provide an employee taking unpaid leave with a similar position upon returning, Cal Fed expressly reserves the right to terminate an employee who has taken a leave of absence if a similar position is not available.

Lillian Garland was employed by Cal Fed as a receptionist for several years. In January 1982, she took a pregnancy disability leave. When she was able to return to work in April of that year, Garland notified Cal Fed, but was informed that her job had been filled and that there were no receptionist or similar positions available. Garland filed a complaint with respondent Department of Fair Employment and Housing, which issued an administrative accusation against Cal Fed on her behalf.[7] Respondent charged Cal Fed with violating § 12945(b)(2) of the FEHA. Prior to the scheduled hearing before respondent Fair Employment and Housing Commission, Cal Fed, joined by petitioners Merchants and Manufacturers Association and the California Chamber of Commerce,[8] brought this action in the United States District Court for the Central District of California.

[7] Cal Fed reinstated Garland in a receptionist position in November 1982, seven months after she first notified it that she was able to return to work.

[8] Petitioner Merchants and Manufacturers Association is a trade association that represents numerous employers throughout the State of California. Petitioner California Chamber of Commerce also represents many California businesses. Both organizations have members that are subject to both Title VII and § 12945(b)(2) and have disability-leave policies similar to Cal Fed's.

They sought a declaration that § 12945(b)(2) is inconsistent with and pre-empted by Title VII and an injunction against enforcement of the section.[9] The District Court granted petitioners' motion for summary judgment. 33 EPD ¶ 34,227, p. 32781, 34 FEP Cases 562 (1984). Citing *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669 (1983),[10] the court stated that "California employers who comply with state law are subject to reverse discrimination suits under Title VII brought by temporarily disabled males who do not receive the same treatment as female employees disabled by pregnancy . . . ." 34 FEP Cases, at 568. On this basis, the District Court held that "California state law and the policies of interpretation and enforcement . . . which require preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions are pre-empted by Title VII and are null, void, invalid and inoperative under the Supremacy Clause of the United States Constitution." *Ibid.*[11]

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[9] Petitioners' complaint also alleged that the California disability-leave statute was pre-empted by § 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U. S. C. § 1144(a). The parties stipulated that petitioners' ERISA claim would be dismissed without prejudice. App. 9–10, nn. 1, 2.

[10] In *Newport News*, the Court evaluated a health insurance plan that provided female employees with benefits for pregnancy-related conditions to the same extent as for other medical conditions, but provided less extensive pregnancy benefits for spouses of male employees. The Court found that this limitation discriminated against male employees with respect to the compensation, terms, conditions, or privileges of their employment in violation of § 703(a)(1) of Title VII. "The 1978 Act [the PDA] makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other conditions. Thus petitioner's plan unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees." 462 U. S., at 684.

[11] After the District Court entered its judgment, Garland moved to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2). The District Court denied her motion on several grounds: untimeliness, lack of a "direct and substantial" interest in the litigation, and adequate representation of

The United States Court of Appeals for the Ninth Circuit reversed. 758 F. 2d 390 (1985). It held that "the district court's conclusion that section 12945(b)(2) discriminates against men on the basis of pregnancy defies common sense, misinterprets case law, and flouts Title VII and the PDA." *Id.*, at 393 (footnote omitted). Based on its own reading of *Newport News*, the Court of Appeals found that the PDA does not "demand that state law be blind to pregnancy's existence." 758 F. 2d, at 395. The court held that in enacting the PDA Congress intended "to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." *Id.*, at 396. Because it found that the California statute furthers the goal of equal employment opportunity for women, the Court of Appeals concluded: "Title VII does not preempt a state law that guarantees pregnant women a certain number of pregnancy disability leave days, because this is neither inconsistent with, nor unlawful under, Title VII." *Ibid.*

We granted certiorari, 474 U. S. 1049 (1986), and we now affirm.

III

A

In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 95 (1983); *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978). Federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. *E. g., Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). Second, congressional in-

her interests by defendants. Her appeal from the order denying intervention was consolidated with the appeal on the merits. In an unreported order, the Court of Appeals for the Ninth Circuit affirmed the denial of intervention; Garland did not seek review of that decision here.

tent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Neither of these bases for pre-emption exists in this case. Congress has explicitly disclaimed any intent categorically to pre-empt state law or to "occupy the field" of employment discrimination law. See 42 U. S. C. §§ 2000e–7 and 2000h–4.

As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). See *Michigan Canners & Freezers Assn., Inc.* v. *Agricultural Marketing and Bargaining Bd.*, 467 U. S. 461, 478 (1984); *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 156 (1982). Nevertheless, pre-emption is not to be lightly presumed. See *Maryland* v. *Louisiana*, 451 U. S. 725, 746 (1981).

This third basis for pre-emption is at issue in this case. In two sections of the 1964 Civil Rights Act, §§ 708 and 1104, Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law. Section 708 of Title VII provides:

> "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment

practice under this title." 78 Stat. 262, 42 U. S. C. § 2000e–7.

Section 1104 of Title XI, applicable to all titles of the Civil Rights Act, establishes the following standard for pre-emption:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 78 Stat. 268, 42 U. S. C. § 2000h–4.

Accordingly, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII; these two sections provide a "reliable indicium of congressional intent with respect to state authority" to regulate employment practice. *Malone* v. *White Motor Corp.*, *supra*, at 505.

Sections 708 and 1104 severely limit Title VII's pre-emptive effect. Instead of pre-empting state fair employment laws, § 708 "'simply left them where they were before the enactment of title VII.'" *Shaw* v. *Delta Air Lines, Inc.*, *supra*, at 103, n. 24 (quoting *Pervel Industries, Inc.* v. *Connecticut Comm'n on Human Rights and Opportunities*, 468 F. Supp. 490, 493 (Conn. 1978), affirmance order, 603 F. 2d 214 (CA2 1979), cert. denied, 444 U. S. 1031 (1980)). Similarly, § 1104 was intended primarily to "assert the intention of Congress to preserve existing civil rights laws." 110 Cong. Rec. 2788 (1964) (remarks of Rep. Meader). See also H. R. Rep. No. 914, 88th Cong., 1st Sess., 59 (1963) (additional views of Rep. Meader).[12] The narrow scope of pre-

[12] Representative Meader, one of the sponsors of the 1964 Civil Rights Act, proposed the precursor to § 1104 as an amendment to the Civil Rights Act, see 110 Cong. Rec. 2788 (1964), because he feared that § 708 and simi-

emption available under §§ 708 and 1104 reflects the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity. See generally *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S., at 101–102; *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 468–469, 472, 477 (1982); *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 63–65 (1980).[13] The legislative history of the PDA also supports a narrow interpretation of these provisions,[14] as does our opinion in *Shaw* v. *Delta Air Lines, Inc.*, *supra*.[15]

In order to decide whether the California statute requires or permits employers to violate Title VII, as amended by the PDA, or is inconsistent with the purposes of the statute, we

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lar provisions in other titles were "wholly inadequate to preserve the validity and force of State laws aimed at discrimination." H. R. Rep. No. 914, 88th Cong., 1st Sess., 59 (1963) (additional views of Rep. Meader). His version provided that state laws would not be pre-empted "except to the extent that there is a direct and positive conflict between such provisions so that the two cannot be reconciled or consistently stand together." 110 Cong. Rec. 2787 (1964). The version ultimately adopted by Congress was a substitute offered by Representative Mathias without objection from Representative Meader. *Id.*, at 2789. There is no indication that this substitution altered the basic thrust of § 1104.

[13] For example, where state or local law prohibits an employment practice, § 706(c) requires deferral of federal enforcement until state or local officials have an opportunity "to act under such State or local law to remedy the practice alleged." § 2000e–5(d).

[14] See, *e. g.*, S. Rep. No. 95–331, p. 3, n. 1 (1977) (state laws prohibiting discrimination on the basis of pregnancy would not be pre-empted, "[s]ince title VII does not pre-empt State laws which would not require violating title VII"), Legislative History of the Pregnancy Discrimination Act of 1978, p. 40 (1980) (Committee Print prepared for the Senate Committee on Labor and Human Resources) (hereinafter Leg. Hist.); 123 Cong. Rec. 29643 (1977) (remarks of Sen. Williams) (state laws that create a "clear conflict" would be pre-empted).

[15] In *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S., at 100–104, we concluded that Title VII did not pre-empt a New York statute which proscribed discrimination on the basis of pregnancy as sex discrimination at a time when Title VII did not equate the two.

must determine whether the PDA prohibits the States from requiring employers to provide reinstatement to pregnant workers, regardless of their policy for disabled workers generally.

B

Petitioners argue that the language of the federal statute itself unambiguously rejects California's "special treatment" approach to pregnancy discrimination, thus rendering any resort to the legislative history unnecessary. They contend that the second clause of the PDA forbids an employer to treat pregnant employees any differently than other disabled employees. Because "'[t]he purpose of Congress is the ultimate touchstone'" of the pre-emption inquiry, *Malone* v. *White Motor Corp.*, 435 U. S., at 504 (quoting *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963)), however, we must examine the PDA's language against the background of its legislative history and historical context. As to the language of the PDA, "[i]t is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" *Steelworkers* v. *Weber*, 443 U. S. 193, 201 (1979) (quoting *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 459 (1892)). See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U. S. 1, 10 (1976); *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543–544 (1940).

It is well established that the PDA was passed in reaction to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976). "When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S., at 678. By adding pregnancy to the definition of sex discrimination prohibited by Title VII, the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*. *Newport News*, *supra*, at 678–679, and

n. 17 (citing legislative history). Rather than imposing a limitation on the remedial purpose of the PDA, we believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied. Cf. 462 U. S., at 678, n. 14 ("The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees"); see also *id.*, at 688 (REHNQUIST, J., dissenting).[16] Accordingly, subject to certain limitations,[17] we agree with the Court of Appeals' conclusion that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." 758 F. 2d, at 396.

The context in which Congress considered the issue of pregnancy discrimination supports this view of the PDA. Congress had before it extensive evidence of discrimination *against* pregnancy, particularly in disability and health insurance programs like those challenged in *Gilbert* and *Nashville Gas Co.* v. *Satty*, 434 U. S. 136 (1977).[18] The Reports, debates, and hearings make abundantly clear that Congress

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[16] Several commentators have construed the second clause of the PDA in this way. See, *e. g.*, Note, Employment Equality Under The Pregnancy Discrimination Act of 1978, 94 Yale L. J. 929, 937 (1985); Note, Sexual Equality Under the Pregnancy Discrimination Act, 83 Colum. L. Rev. 690, 696, and n. 26 (1983).

[17] For example, a State could not mandate special treatment of pregnant workers based on stereotypes or generalizations about their needs and abilities. See *infra*, at 290.

[18] See Discrimination on the Basis of Pregnancy, 1977, Hearings on S. 995 before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess., 31–33 (1977) (statement of Vice Chairman, Equal Employment Opportunity Commission, Ethel Bent Walsh); *id.*, at 113–117 (statement of Wendy W. Williams); *id.*, at 117–121 (statement of Susan Deller Ross); *id.*, at 307–310 (statement of Bella S. Abzug). See also Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy, Hearings on H. R. 5055 and H. R. 6075 before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 95th Cong., 1st Sess. (1977).

intended the PDA to provide relief for working women and to end discrimination against pregnant workers.[19] In contrast to the thorough account of discrimination against pregnant workers, the legislative history is devoid of any discussion of preferential treatment of pregnancy,[20] beyond acknowledgments of the existence of state statutes providing for such preferential treatment. See *infra*, at 287. Opposition to the PDA came from those concerned with the cost of including pregnancy in health and disability-benefit plans and the application of the bill to abortion,[21] not from those who favored special accommodation of pregnancy.

In support of their argument that the PDA prohibits employment practices that favor pregnant women, petitioners and several *amici* cite statements in the legislative history to the effect that the PDA does not *require* employers to extend any benefits to pregnant women that they do not already provide to other disabled employees. For example, the House Report explained that the proposed legislation "does not re-

[19] See, *e. g.*, 123 Cong. Rec. 8144 (1977) (remarks of Sen. Bayh) (legislation "will end employment discrimination against pregnant workers"); 124 Cong Rec. 21440 (1978) (remarks of Rep. Chisholm) (bill "affords some 41 percent of this Nation's labor force some greater degree of protection and security without fear of reprisal due to to their decision to bear children"); *id.*, at 21442 (remarks of Rep. Tsongas) (bill "would put an end to an unrealistic and unfair system that forces women to choose between family and career—clearly a function of sex bias in the law"); *id.*, at 36818 (remarks of Sen. Javits) (the "bill represents only basic fairness for women employees"); *id.*, at 38574 (remarks of Rep. Sarasin) (Subcommittee "learned of the many instances of discrimination against pregnant workers, as we learned of the hardships this discrimination brought to women and their families").

[20] The statement of Senator Brooke, quoted in the dissent, *post*, at 300, merely indicates the Senator's view that the PDA does not *itself* require special disability benefits for pregnant workers. It in no way supports the conclusion that Congress intended to prohibit the *States* from providing such benefits for pregnant workers. See n. 29, *infra*.

[21] See, *e. g.*, S. Rep. No. 95–331, p. 9 (1977), Leg. Hist. 46 (discussing cost objections); H. R. Conf. Rep. No. 95–1786, pp. 3–4 (1978), Leg. Hist. 196–197 (application of the PDA to abortion).

quire employers to treat pregnant employees in any particular manner. . . . H. R. 6075 in no way requires the institution of any new programs where none currently exist."[22] We do not interpret these references to support petitioners' construction of the statute. On the contrary, if Congress had intended to *prohibit* preferential treatment, it would have been the height of understatement to say only that the legislation would not *require* such conduct. It is hardly conceivable that Congress would have extensively discussed only its intent not to require preferential treatment if in fact it had intended to prohibit such treatment.

We also find it significant that Congress was aware of state laws similar to California's but apparently did not consider them inconsistent with the PDA. In the debates and Reports on the bill, Congress repeatedly acknowledged the existence of state antidiscrimination laws that prohibit sex discrimination on the basis of pregnancy.[23] Two of the States mentioned then required employers to provide reasonable leave to pregnant workers.[24] After citing these state laws,

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[22] H. R. Rep. No. 95–948, p. 4 (1978), Leg. Hist. 150. See also S. Rep. No. 95–331, *supra*, at 4, Leg. Hist. 41; 123 Cong. Rec. 7540 (1977) (remarks of Sen. Williams); *id.*, at 10582 (remarks of Rep. Hawkins); *id.*, at 29387 (remarks of Sen. Javits); *id.*, at 29664 (remarks of Sen. Brooke).

[23] See, *e. g.*, *id.*, at 29387 (remarks of Sen. Javits), Leg. Hist. 67 ("[S]everal state legislatures . . . have chosen to address the problem by mandating certain types of benefits for pregnant employees"). See also S. Rep. No. 95–331, *supra*, at 3, Leg. Hist. 40; H. R. Rep. No. 95–948, *supra*, at 10–11, Leg. Hist. 156–157; 123 Cong. Rec. 29648 (1977) (list of States that require coverage for pregnancy and pregnancy-related disabilities); *id.*, at 29662 (remarks of Sen. Williams).

[24] See, *e. g.*, Conn. Gen. Stat. § 31–126(g) (1977), now codified at § 46a–60(a)(7) (1985); Mont. Rev. Codes § 41–2602 (Smith Supp. 1977), now codified at Mont. Code Ann. §§ 49–2–310 and 49–2–311 (1986). The Connecticut statute provided, in relevant part:

"It shall be an unfair employment practice

. . . . . .

"(g) For an employer . . . (ii) to refuse to grant to [a pregnant] employee a reasonable leave of absence for disability resulting from such preg-

Congress failed to evince the requisite "clear and manifest purpose" to supersede them. See *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 206 (1983). To the contrary, both the House and Senate Reports suggest that these laws would continue to have effect under the PDA.[25]

Title VII, as amended by the PDA, and California's pregnancy disability leave statute share a common goal. The purpose of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971). See *Hishon* v. *King & Spalding*, 467 U. S. 69, 75, n. 7 (1984); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 763 (1976); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). Rather than limiting existing Title VII principles and objectives, the PDA extends

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nancy. . . . (iii) Upon signifying her intent to return, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so." Conn. Gen. Stat. § 31–126(g) (1977).

The Montana statute in effect in 1977 was virtually identical. Both have been recodified in current statutory compilations, but the leave and reinstatement requirements are unchanged. See also Mass. Gen. Laws § 149:105D (1985) (providing up to eight weeks maternity leave).

The dissent suggests that the references to the Connecticut and Montana statutes should be disregarded, because Congress did not expressly state that it understood that "these statutes required anything more than equal treatment." *Post*, at 301. However, we are not as willing as the dissent to impute ignorance to Congress. Where Congress has cited these statutes in the House and Senate Reports on the PDA, we think it fair to assume that it was aware of their substantive provisions.

[25] For example, the Senate Report states: "Since title VII does not preempt State laws which would not require violating title VII . . . , these States would continue to be able to enforce their State laws if the bill were enacted." S. Rep. No. 95–331, *supra*, at 3, n. 1, Leg. Hist. 40.

them to cover pregnancy.[26] As Senator Williams, a sponsor of the Act, stated: "The entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life." 123 Cong. Rec. 29658 (1977).

Section 12945(b)(2) also promotes equal employment opportunity. By requiring employers to reinstate women after a reasonable pregnancy disability leave, § 12945(b)(2) ensures that they will not lose their jobs on account of pregnancy disability.[27] California's approach is consistent with the dissenting opinion of JUSTICE BRENNAN in *General Electric Co.* v. *Gilbert*, which Congress adopted in enacting the PDA. Referring to *Lau* v. *Nichols*, 414 U. S. 563 (1974), a Title VI decision, JUSTICE BRENNAN stated:

> "[D]iscrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration of the uniqueness of the 'disadvantaged' individuals. A realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies." 429 U. S., at 159 (footnote omitted).

By "taking pregnancy into account," California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs.

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[26] "Proponents of the bill repeatedly emphasized that the Supreme Court had erroneously interpreted congressional intent and that the amending legislation was necessary to reestablish the principles of Title VII law as they had been understood prior to the *Gilbert* decision." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S., at 679.

[27] As authoritatively construed by respondent Commission, the provision will "insure that women affected by pregnancy, childbirth or related medical conditions have equal employment opportunities as persons not so affected." California Fair Employment and Housing Commission's Proposed Regulation, see App. 49.

We emphasize the limited nature of the benefits § 12945 (b)(2) provides. The statute is narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions. Accordingly, unlike the protective labor legislation prevalent earlier in this century,[28] § 12945(b)(2) does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers. A statute based on such stereotypical assumptions would, of course, be inconsistent with Title VII's goal of equal employment opportunity. See, *e. g.*, *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 709 (1978); *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 545 (1971) (MARSHALL, J., concurring).

C

Moreover, even if we agreed with petitioners' construction of the PDA, we would nonetheless reject their argument that the California statute requires employers to violate Title VII.[29] Section 12945(b)(2) does not prevent employers from

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[28] See generally B. Brown, A. Freedman, H. Katz, & A. Price, Women's Rights and the Law 209–210 (1977). In the constitutional context, we have invalidated on equal protection grounds statutes designed "to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior." *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 725 (1982).

[29] Petitioners assert that even if § 12945(b)(2) does not *require* employers to treat pregnant employees differently from other disabled employees, it *permits* employers to do so because it does not specifically prohibit different treatment. Of course, since the PDA does not itself prohibit different treatment, it certainly does not require the States to do so. Moreover, if we were to interpret the term "permit" as expansively as petitioners suggest, the State would be required to incorporate every prohibition contained in Title VII into its state law, since it would otherwise be held to "permit" any employer action it did not expressly prohibit. We conclude that "permit" in § 708 must be interpreted to pre-empt only those state laws that expressly *sanction* a practice unlawful under Title VII; the term does not pre-empt state laws that are silent on the practice.

complying with both the federal law (as petitioners construe it) and the state law. This is not a case where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S., at 142–143, or where there is an "inevitable collision between the two schemes of regulation." *Id.*, at 143.[30] Section 12945(b)(2) does not compel California employers to treat pregnant workers *better* than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers. Employers are free to give comparable benefits to other disabled employees, thereby treating "women affected by pregnancy" no better than "other persons not so affected but similar in their ability or inability to work." Indeed, at oral argument, petitioners conceded that compliance with both statutes "is theoretically possible." Tr. of Oral Arg. 6.

Petitioners argue that "extension" of the state statute to cover other employees would be inappropriate in the absence of a clear indication that this is what the California Legislature intended. They cite cases in which this Court has declined to rewrite underinclusive state statutes found to violate the Equal Protection Clause. See, *e. g.*, *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U. S. 142, 152–153 (1980); *Caban* v. *Mohammed*, 441 U. S. 380, 392–393, n. 13 (1979). This argument is beside the point. Extension is a remedial option to be exercised by a court once a statute is

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[30] Indeed, Congress and the California Legislature were each aware in general terms of the regulatory scheme adopted by the other when they enacted their legislation. California recognized that many of its provisions would be pre-empted by the PDA and, accordingly, exempted employers covered by Title VII from all portions of the statute except those guaranteeing unpaid leave and reinstatement to pregnant workers. Congress was aware that some state laws mandated certain benefits for pregnant workers, but did not indicate that they would be pre-empted by federal law. See *supra*, at 287–288.

found to be invalid.[31] See, *e. g.*, *Califano* v. *Westcott*, 443 U. S. 76, 89 (1979) (quoting *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result)).

IV

Thus, petitioners' facial challenge to § 12945(b)(2) fails. The statute is not pre-empted by Title VII, as amended by the PDA, because it is not inconsistent with the purposes of the federal statute, nor does it require the doing of an act which is unlawful under Title VII.[32]

The judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

The Pregnancy Discrimination Act of 1978 (PDA) does not exist in a vacuum. As JUSTICE WHITE recognizes in his dissent, Congress did not intend to "put pregnancy in a class by itself within Title VII," and the enactment of the PDA "did not mark a departure from Title VII principles." *Post*, at 298–299. But this realization does not lead me to support JUSTICE WHITE's position; rather, I believe that the PDA's posture as part of Title VII compels rejection of his argument that the PDA mandates complete neutrality and forbids all beneficial treatment of pregnancy.[1]

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[31] We recognize that, *in cases where a state statute is otherwise invalid*, the Court must look to the intent of the state legislature to determine whether to extend benefits or nullify the statute. By arguing that extension would be inappropriate in this case, however, *post*, at 302–303, and citing this as a basis for pre-emption, the dissent simply ignores the prerequisite of invalidity.

[32] Because we conclude that in enacting the PDA Congress did not intend to prohibit all favorable treatment of pregnancy, we need not decide and therefore do not address the question whether § 12945(b)(2) could be upheld as a legislative response to leave policies that have a disparate impact on pregnant workers.

[1] Because I agree with the Court that the California statute does not conflict with the purposes of the PDA, and does not purport to "require or permit" action inconsistent with the PDA, I do not reach the question

In *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), the Court rejected the argument that Title VII prohibits all preferential treatment of the disadvantaged classes that the statute was enacted to protect. The plain words of Title VII, which would have led to a contrary result, were read in the context of the statute's enactment and its purposes.[2] In this case as well, the language of the Act seems to mandate treating preg-

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whether § 1104 of the Civil Rights Act of 1964, 42 U. S. C. § 2000h–4, is applicable to Title VII, or whether, as JUSTICE SCALIA suggests, § 708, 42 U. S. C. § 2000e–7, is the only provision governing Title VII's pre-emptive scope. Even if § 1104 applies, the California statute would not be pre-empted in this case. Since Part III–A of JUSTICE MARSHALL's opinion does not make clear whether it decides this issue, or whether it only assumes for the purposes of the decision that § 1104 applies, I do not join that section. I do, however, join the remainder of the Court's opinion.

The choice between disposing of the case through interpreting the pre-emption provisions of Title VII and Title XI as JUSTICE SCALIA does, or through interpreting the substance of the PDA and thus obviating the need to decide the Title XI question, is a choice between two grounds of statutory construction. Neither approach is inherently narrower than the other. Given the value of having an opinion for the Court, I have therefore concluded that I should choose between the conflicting views of the PDA expressed by JUSTICE MARSHALL and JUSTICE WHITE, even though JUSTICE SCALIA may be correct in arguing that this case could be decided without reaching that issue.

[2] There is a striking similarity between the evidence about the enactment of Title VII that was available in *Steelworkers* v. *Weber* and the evidence available regarding the enactment of the PDA. First, the plain language in both cases points to neutrality, see *ante*, at 284; 443 U. S., at 201, although, if anything, that language was even less equivocal in *Weber* than it is here. See *ante*, at 285. Second, in both cases the records are replete with indications that Congress' goal was to bar discrimination against the disadvantaged class or classes at issue. See *ante*, at 285–286; 443 U. S., at 201–204. Third, in neither case was there persuasive evidence that Congress considered the ramifications of a rule mandating complete neutrality. See *ante*, at 286; 443 U. S., at 204. Finally, there were statements in the legislative histories of both provisions stressing that Congress did not intend to *require* preferential treatment, statements that undermine the conclusion that Congress indeed intended to *prohibit* such treatment. See *ante*, at 286; 443 U. S., at 204–206.

nant employees the same as other employees. I cannot, however, ignore the fact that the PDA is a definitional section of Title VII's prohibition against gender-based discrimination. Had *Weber* interpreted Title VII as requiring neutrality, I would agree with JUSTICE WHITE that the PDA should be interpreted that way as well. But since the Court in *Weber* interpreted Title VII to draw a distinction between discrimination *against* members of the protected class and special preference *in favor of* members of that class, I do not accept the proposition that the PDA requires absolute neutrality.

I therefore conclude that JUSTICE MARSHALL's view, which holds that the PDA allows some preferential treatment of pregnancy, is more consistent with our interpretation of Title VII than JUSTICE WHITE's view is. This is not to say, however, that all preferential treatment of pregnancy is automatically beyond the scope of the PDA.[3] Rather, as with other parts of Title VII, preferential treatment of the disadvantaged class is only permissible so long as it is consistent with "accomplish[ing] the goal that Congress designed Title VII to achieve." *Weber*, *supra*, at 204.[4] That goal has been

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[3] I do not read the Court's opinion as holding that Title VII presents no limitations whatsoever on beneficial treatment of pregnancy. Although the opinion does make some mention of the "floor" but "not a ceiling" language employed by the Court of Appeals, see *ante*, at 285, the Court also points out that there are limitations on what an employer can do, even when affording "preferential" treatment to pregnancy. See *ante*, at 285, n. 17, 290. Indeed, the Court of Appeals also subjected California's statute to the test of "whether the policy furthers 'Title VII's prophylactic purpose of achieving "equality of employment opportunities."'" 758 F. 2d 390, 396 (1985) (quoting *EEOC* v. *Puget Sound Log Scaling & Grading Bureau*, 752 F. 2d 1389, 1392 (CA9 1985) (in turn quoting *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429 (1971))).

[4] The Court has not yet had occasion to explore the exact line of demarcation between permissible and impermissible preferential treatment under Title VII. The factors discussed in *Weber* are, in my view, merely exemplary, and do not necessarily define the outer limits of what a private employer or a State may do to in an attempt to effectuate the goals of Title VII.

characterized as seeking "to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971).

It is clear to me, as it is to the Court,[5] and was to the Court of Appeals,[6] that the California statute meets this test. Thus, I agree that a California employer would not violate the PDA were it to comply with California's statute without affording the same protection to men suffering somewhat similar disabilities.

JUSTICE SCALIA, concurring in the judgment.

The only provision of the Civil Rights Act of 1964 whose effect on pre-emption need be considered in the present case is § 708 of Title VII, 42 U. S. C. § 2000e–7. Although both that section and § 1104, 42 U. S. C. § 2000h–4, are described by the majority as pre-emption provisions, they are more precisely *antipre-emption* provisions, prescribing that nothing in Title VII (in the case of § 708) and nothing in the entire Civil Rights Act (in the case of § 1104) shall be deemed to pre-empt state law unless certain conditions are met. The exceptions set forth in the general § 1104 ban on pre-emption ("inconsisten[cy] with any of the purposes of this Act, or any provision thereof") are somewhat broader than the single exception set forth in the Title VII § 708 ban. Because the Pregnancy Disability Act (PDA) is part of Title VII, the more expansive prohibition of pre-emption particularly applicable to that Title applies. If that precludes pre-emption of Cal. Govt. Code Ann. § 12945(b)(2) (West 1980), it is unnecessary to inquire whether § 1104 would do so.

Section 708 narrows the pre-emptive scope of the PDA so that it pre-empts only laws which "purpor[t] to require or permit the doing of any act which would be an unlawful employ-

[5] See *ante*, at 289.

[6] 758 F. 2d, at 396.

ment practice" under the Title. 42 U. S. C. § 2000e–7. Thus, whether or not the PDA prohibits discriminatorily favorable disability treatment for pregnant women, § 12945(b)(2) of the California Code cannot be pre-empted, since it does not remotely purport to require or permit any refusal to accord federally mandated equal treatment to others similarly situated. No more is needed to decide this case.

The majority not only ignores the clear antipre-emptive effect of § 708, but, even proceeding on the basis of its more generalized pre-emption analysis, decides more than is necessary. Its reasoning is essentially as follows: It is consistent with the requirements and purposes of the PDA for a State to require special treatment for pregnancy disability (Part III–B); and besides, the state law here at issue does not require special treatment for pregnancy disability (Part III–C). By parity of analysis, we can decide any issue, so long as the facts before us either do or do not present it. There are proper occasions for alternative holdings, where one of the alternatives does not eliminate the jurisdictional predicate for the other—though even in that situation the practice is more appropriate for lower courts than for this Court, whose first arrow runs no risk of being later adjudged to have missed its mark. But where, as here, it is entirely clear that an issue of law is not presented by the facts of the case, it is beyond our jurisdiction to reach it.

I am fully aware that it is more convenient for the employers of California and the California Legislature to have us interpret the PDA prematurely. It has never been suggested, however, that the constitutional prohibition upon our rendering of advisory opinions is a doctrine of convenience. I would affirm the judgment of the Court of Appeals on the ground that § 12945(b)(2) of the California Code does not purport to require or permit any act that would be an unlawful employment practice under any conceivable interpretation of the PDA, and therefore, by virtue of § 708, cannot be pre-empted.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

I disagree with the Court that Cal. Govt. Code Ann. § 12945(b)(2) (West 1980) is not pre-empted by the Pregnancy Discrimination Act of 1978 (PDA), 92 Stat. 2076, codified at 42 U. S. C. § 2000e(k), and § 708 of Title VII. Section 703(a) of Title VII, 78 Stat. 255, 42 U. S. C. § 2000e–2(a), forbids discrimination in the terms of employment on the basis of race, color, religion, sex, or national origin. The PDA gave added meaning to discrimination on the basis of sex:

> "The terms 'because of sex' or 'on the basis of sex' [in § 703(a) of this Title] include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." § 2000e(k).

The second clause quoted above could not be clearer: it mandates that pregnant employees "shall be treated the same for all employment-related purposes" as nonpregnant employees similarly situated with respect to their ability or inability to work. This language leaves no room for preferential treatment of pregnant workers. The majority would avoid its plain meaning by misapplying our interpretation of the clause in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678, n. 14 (1983). *Ante*, at 285. The second clause addresses only female employees and was not directly implicated in *Newport News* because the pregnant persons at issue in that case were spouses of male employees. We therefore stated in *Newport News* that the second clause had only explanatory or illustrative significance. We did not indicate in any way, however, that the

second clause does not mean exactly what it says in a situation where it is directly implicated.

Contrary to the mandate of the PDA, California law requires every employer to have a disability leave policy for pregnancy even if it has none for any other disability. An employer complies with California law if it has a leave policy for pregnancy but denies it for every other disability. On its face, § 12945(b)(2) is in square conflict with the PDA and is therefore pre-empted. Because the California law permits employers to single out pregnancy for preferential treatment and therefore to violate Title VII, it is not saved by § 708 which limits pre-emption of state laws to those that require or permit an employer to commit an unfair employment practice.[1]

The majority nevertheless would save the California law on two grounds. First, it holds that the PDA does not require disability from pregnancy to be treated the same as other disabilities; instead, it forbids less favorable, but permits more favorable, benefits for pregnancy disability. The express command of the PDA is unambiguously to the contrary, and the legislative history casts no doubt on that mandate.

The legislative materials reveal Congress' plain intent not to put pregnancy in a class by itself within Title VII, as the majority does with its "floor . . . not a ceiling" approach. *Ante*, at 285. The Senate Report clearly stated:

> "By defining sex discrimination to include discrimination against pregnant women, the bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions. Under this bill, the treatment of

[1] The same clear language preventing preferential treatment based on pregnancy forecloses respondents' argument that the California provision can be upheld as a legislative response to leave policies that have a disparate impact on pregnant workers. Whatever remedies Title VII would otherwise provide for victims of disparate impact, Congress expressly ordered pregnancy to be treated in the same manner as other disabilities.

> pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working."[2]

The House Report similarly stressed that the legislation did not mark a departure from Title VII principles:

> "It must be emphasized that this legislation, *operating as part of Title VII*, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. H. R. 6075 in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work."[3]

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[2] S. Rep. No. 95–331, p. 4 (1977), Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources), p. 41 (1980) (Leg. Hist.).

[3] H. R. Rep. No. 95–948, p. 4 (1978), Leg. Hist. 150 (emphasis added). The same theme was also expressed repeatedly in the floor debates. Senator Williams, for example, the Chairman of the Senate Committee on Labor and Human Resources and a sponsor of the Senate bill, described the bill as follows in his introduction of the bill to the Senate:

"The central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work. The key to compliance in every case will be equality of treatment. In this way, the law will protect women from the full range of discriminatory practices which have adversely affected their status in the work force." 123 Cong. Rec. 29385 (1977), Leg. Hist. 62–63.

The majority correctly reports that Congress focused on discrimination against, rather than preferential treatment of, pregnant workers. There is only one direct reference in the legislative history to preferential treatment. Senator Brooke stated during the Senate debate: "I would emphasize most strongly that S. 995 in no way provides special disability benefits for working women. They have not demanded, nor asked, for such benefits. They have asked only to be treated with fairness, to be accorded the same employment rights as men."[4] Given the evidence before Congress of the widespread discrimination against pregnant workers, it is probable that most Members of Congress did not seriously consider the possibility that someone would want to afford preferential treatment to pregnant workers. The parties and their *amici* argued vigorously to this Court the policy implications of preferential treatment of pregnant workers. In favor of preferential treatment it was urged with conviction that preferential treatment merely enables women, like men, to have children without losing their jobs. In opposition to preferential treatment it was urged with equal conviction that preferential treatment represents a resurgence of the 19th-century protective legislation which perpetuated sex-role stereotypes and which impeded women in their efforts to take their rightful place in the workplace. See, *e. g.*, *Muller* v. *Oregon*, 208 U. S. 412, 421–423 (1908); *Bradwell* v. *Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring). It is not the place of this Court, however, to resolve this policy dispute. Our task is to interpret Congress' intent in enacting the PDA. Congress' silence in its consideration of the PDA with respect to preferential treatment of pregnant workers cannot fairly be interpreted to abrogate the plain statements in the legislative history, not to mention the language of the statute, that equality of treatment was to be the guiding principle of the PDA.

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[4] 123 Cong. Rec. 29664 (1977), Leg. Hist. 135.

Congress' acknowledgment of state antidiscrimination laws does not support a contrary inference. *Ante*, at 287–288. The most extensive discussion of state laws governing pregnancy discrimination is found in the House Report.[5] It was reported that six States, Alaska, Connecticut, Maryland, Minnesota, Oregon, and Montana, and the District of Columbia specifically included pregnancy in their fair employment practices laws. In 12 additional States, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Missouri, New York, Pennsylvania, South Dakota, Washington, and Wisconsin, the prohibition on sex discrimination in the state fair employment practices law had been interpreted, either by a state court or the state enforcement agency, to require equal treatment of pregnant workers. Finally, five States, California, Hawaii, New Jersey, New York, and Rhode Island, had included pregnancy in their temporary disability laws under which private employers are required to provide partial wage replacement for temporary disabilities. The Report noted, however, that whereas California, New Jersey, and New York covered complications from pregnancy on the same basis as other disabilities, California, New Jersey, New York, and Rhode Island set maximum limits on the coverage required for disability associated with normal childbirth. The Report did not in any way set apart the Connecticut and Montana statutes, on which the majority relies, from the other state statutes. The House Report gave no indication that these statutes required anything more than equal treatment. Indeed, the state statutes were considered, not in the context of pre-emption, but in the context of a discussion of health insurance costs. The House Report expressly stated: "The significance of this State coverage" is that "many employers are *already* under a State law obligation to provide benefits to pregnant disabled workers. Passage of the bill thus has little or no economic impact on such employers."[6]

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[5] H. R. Rep. No. 95–948, *supra*, at 10–11, Leg. Hist. 156–157.

[6] H. R. Rep. No. 95–948, *supra*, at 11, Leg. Hist. 157 (emphasis in original).

Nor does anything in the legislative history from the Senate side indicate that it carefully considered the state statutes, including those of Connecticut and Montana, and expressly endorsed their provisions. The Senate Report noted that "25 States presently interpret their own fair employment practices laws to prohibit sex discrimination based on pregnancy and childbirth," and Senator Williams presented during the Senate debate a list of States which required coverage for pregnancy and pregnancy-related disabilities, but there was no analysis of their provisions.[7] The majority seems to interpret Senator Javits' acknowledgment that several state legislatures, including New York, his own State, had mandated certain benefits for pregnant employees as an unqualified endorsement of those state statutes. *Ante*, at 287, n. 23. Later, however, when pressed by Senator Hatch about the fact that the New York statute limited the required coverage of disability caused by pregnancy to eight weeks, Senator Javits had no hesitation in expressing his disagreement with the New York statute.[8] Passing reference to state statutes without express recognition of their content and without express endorsement is insufficient in my view to override the PDA's clear equal-treatment mandate, expressed both in the statute and its legislative history.

The Court's second, and equally strange, ground is that even if the PDA does prohibit special benefits for pregnant women, an employer may still comply with both the California law and the PDA: it can adopt the specified leave policies for pregnancy and at the same time afford similar benefits for all other disabilities. This is untenable. California surely had no intent to require employers to provide general disability leave benefits. It intended to prefer pregnancy and went no further. Extension of these benefits to the entire work force would be a dramatic increase in the scope of the state

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[7] S. Rep. No. 95–331, at 3, Leg. Hist. 40; 123 Cong. Rec. 29648 (1977), Leg. Hist. 91.

[8] 123 Cong. Rec. 29654–29655 (1977), Leg. Hist. 108–110.

law and would impose a significantly greater burden on California employers. That is the province of the California Legislature. See *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U. S. 142, 152–153 (1980); *Caban* v. *Mohammed*, 441 U. S. 380, 392–393, n. 13 (1979); *Craig* v. *Boren*, 429 U. S. 190, 210, n. 24 (1976). Nor can § 12945(b)(2) be saved by applying Title VII in tandem with it, such that employers would be required to afford reinstatement rights to pregnant workers as a matter of state law but would be required to afford the same rights to all other workers as a matter of federal law. The text of the PDA does not speak to this question but it is clear from the legislative history that Congress did not intend for the PDA to impose such burdens on employers. As recognized by the majority, opposition to the PDA came from those concerned with the cost of including pregnancy in health and disability benefit plans. *Ante*, at 286. The House Report acknowledged these concerns and explained that the bill "in no way requires the institution of any new programs where none currently exist."[9] The Senate Report gave a similar assurance.[10] In addition, legislator after legislator stated during the floor debates that the PDA would not require an employer to institute a disability benefits program if it did not already have one in effect.[11] Congress intended employers to be free to

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[9] H. R. Rep. No. 95–948, at 4, Leg. Hist. 150.

[10] S. Rep. No. 95–331, *supra*, at 4, Leg. Hist. 41.

[11] 123 Cong. Rec. 7541 (1977), Leg. Hist. 8 (remarks of Sen. Brooke) ("[T]he bill being introduced would not mandate compulsory disability coverage"); 123 Cong. Rec., at 8145, Leg. Hist. 19 (remarks of Sen. Bayh) ("Under the provisions of our legislation, only those companies which already voluntarily offer disability coverage would be affected"); 123 Cong. Rec., at 10582, Leg. Hist. 25 (remarks of Rep. Hawkins) ("[A]n employer who does not now provide disability benefits to his employees will not have to provide such benefits to women disabled due to pregnancy or childbirth"); 123 Cong. Rec., at 29386, Leg. Hist. 64 (remarks of Sen. Williams) ("[T]his legislation does not require that any employer begin to provide health insurance where it is not presently provided"); 123 Cong. Rec., at

provide any level of disability benefits they wished—or none at all—as long as pregnancy was not a factor in allocating such benefits. The conjunction of § 12945(b)(2) and the PDA requires California employers to implement new minimum disability leave programs. Reading the state and federal statutes together in this fashion yields a result which Congress expressly disavowed.

In sum, preferential treatment of pregnant workers is prohibited by Title VII, as amended by the PDA. Section 12945(b)(2) of the California Government Code, which extends preferential benefits for pregnancy, is therefore pre-empted. It is not saved by § 708 because it purports to authorize employers to commit an unfair employment practice forbidden by Title VII.[12]

29388, Leg. Hist. 71 (remarks of Sen. Kennedy) ("This amendment does not require all employers to provide disability insurance plans; it merely requires that employers who have disability plans for their employees treat pregnancy-related disabilities in the same fashion that all other temporary disabilities are treated with respect to benefits and leave policies"); 123 Cong. Rec., at 29663, Leg. Hist. 131 (remarks of Sen. Cranston) ("[S]ince the basic standard is comparability among employees, an employer who does not provide medical benefits at all, would not have to pay the medical costs of pregnancy or child birth"); 123 Cong. Rec., at 29663, Leg. Hist. 133 (remarks of Sen. Culver) ("The legislation before us today does not mandate compulsory disability coverage").

[12] Section 12945(b)(2) does not *require* employers to treat pregnant employees better than other disabled employees; employers are free voluntarily to extend the disability leave to all employees. But if this is not a statute which "purports to . . . permit the doing of any act which would be an unlawful employment practice" under Title VII, I do not know what such a statute would look like. See, *ante*, at 290, n. 29.

Neither is § 12945(b)(2) saved by § 1104 of the Civil Rights Act since it is inconsistent with the equal-treatment purpose and provisions of Title VII.

WEST VIRGINIA *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85–937. Argued November 10, 1986—Decided January 13, 1987

The President declared floods that occurred in 1972 in West Virginia to be "major disasters," qualifying the affected areas for federal relief under the Disaster Relief Act of 1970 (DRA) (later repealed). Section 226(a) of the DRA provided that any mobile home or temporary housing for displaced persons was to be placed on a site provided by the State "without charge to the United States." In the aftermath of the disasters here, the Army Corps of Engineers, at the State's request, prepared sites for mobile homes and, in late 1972 and early 1973, billed the State for such services. The State acknowledged the bills, but failed to make any payment. After delaying at the State's request, the United States brought suit against the State in 1978, seeking to recover site preparation costs plus prejudgment interest. The District Court held that the State was contractually obligated to the Corps for site preparation services, but denied the United States' motion for an order of prejudgment interest on the debt. The Court of Appeals affirmed the District Court's holding that the State was contractually obligated on the debt, but reversed the determination that the State was not liable for prejudgment interest.

Held: West Virginia is liable for prejudgment interest on the debt arising from the contractual obligation to reimburse the United States for services rendered by the Corps. The rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state law. While there are instances in which state law may be adopted as the federal rule of decision, this case presents no compelling reason for doing so. A single nationwide rule is preferable, and the incorporation of state law would not give due regard to the federal interest in maintaining the apportionment of responsibility Congress devised in the DRA. Before applying to a State the usual federal rule that private parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money, *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, a federal court should consider the interests of the two governments involved. *Board of Comm'rs of Jackson County* v. *United States*, 308 U. S. 343, 350. Here, federal policy plainly calls for an award of interest. The DRA's purpose was not to relieve States of the entire burden of disaster relief, but to apportion that responsibility

between the State and Federal Governments. Section 226(a) reflects the statute's allocative intent that the Federal Government not bear the cost of site preparation for temporary housing, and prejudgment interest is an element of complete compensation to the Federal Government. The State asserts no interest that would justify relieving it of its obligation to compensate the Federal Government fully. Because States have no sovereign immunity as against the Federal Government, any state rule exempting the sovereign from the payment of prejudgment interest not only does not apply of its own force to the State's obligations to the Federal Government, but also does not represent a policy that the Federal Government is obliged to further. Pp. 308–313.

764 F. 2d 1028, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Charles G. Brown, Attorney General of West Virginia, argued the cause for petitioner. With him on the briefs were *Silas B. Taylor*, Deputy Attorney General, and *J. Bradley Russell*, Assistant Attorney General.

Deputy Solicitor General Lauber argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Wallace, Charles A. Rothfeld, William Kanter*, and *Bruce G. Forrest.*

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether the State of West Virginia is liable for prejudgment interest on a debt arising from a contractual obligation to reimburse the United States for services rendered by the Army Corps of Engineers.

I

On February 26, 1972, heavy rains and resulting floods caused the collapse of a coal waste dam on Buffalo Creek in southwestern West Virginia. The "Buffalo Creek disaster" caused over 100 deaths and millions of dollars of property damage and left thousands homeless. In August of that year, a series of storms caused widespread flooding and mudslides in the same region of the State. Although there

was no additional loss of life, the "Gilbert Creek disaster" caused substantial property damage.

The President declared both events "major disasters," qualifying the affected areas for federal relief under the Disaster Relief Act of 1970, Pub. L. 91–606, 84 Stat. 1744, 42 U. S. C. § 4401 (1970 ed.) (DRA or Act), repealed Pub. L. 93–288, 88 Stat. 164. Section 226(a) of the Act authorized the Director of the Office of Emergency Preparedness to provide temporary housing, typically mobile homes, for persons displaced by the disaster. That section also governed site preparation for the mobile homes. It provided:

> "Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided by State or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at Federal expense when he determines such action to be in the public interest." 42 U. S. C. § 4436 (1970 ed.).

In the aftermath of both disasters, the State found itself unable to prepare sites for the mobile homes. It asked the Army Corps of Engineers to do so, and the Corps agreed. In late 1972 and early 1973, the Corps billed the State for its site preparation services. The State acknowledged the bills, but, despite several requests, failed to make any payment. After delaying at the State's request, the United States brought suit against West Virginia in 1978, seeking to recover $4.2 million in site preparation costs plus prejudgment interest. West Virginia denied liability for the debt, claiming that the state official who had entered into the agreement had acted without authority. The District Court rejected this claim and found that the State was contractually obligated to the Corps for site preparation services. Civ. Action No. 78–2049 (SD W. Va., Sept. 27, 1982). The United States then moved for an order of prejudgment interest on

the outstanding debt.[1] The District Court denied the motion. It held that the appropriate analysis required an examination of the congressional purpose underlying the DRA and the relative equities between the parties. After completing that analysis, the District Court concluded that the State should not be liable for prejudgment interest. Civ. Action No. R–78–2049 (SD W. Va., Jan. 28, 1983).

The United States Court of Appeals for the Fourth Circuit affirmed the District Court's holding that the State was contractually obligated on the debt, but reversed the determination that the State was not liable for prejudgment interest. 764 F. 2d 1028 (1985). It held that the question was governed by federal law, under which prejudgment interest was allowable as a matter of right in a breach-of-contract action where the amount due was liquidated, ascertained, or agreed to. *Id.*, at 1030–1031. The Court of Appeals rejected the District Court's conclusion that the determination whether prejudgment interest was owing depended on a balancing of equities, but held that, even if it were to apply the balancing test, the United States would prevail. *Id.*, at 1032–1033. It remanded the case to the District Court to enter an award of prejudgment interest. We granted certiorari, limited to the question whether West Virginia was properly required to pay prejudgment interest. 475 U. S. 1009 (1986). We affirm.

II

"[T]he rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for nonpayment of the amount found to be

[1] The amount sought was $5,783,098.09 through October 18, 1982, plus $2,841.26 for every day thereafter until judgment was entered. App. to Pet. for Cert. C–3, n. 2.

due." *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296 (1941); see also *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366–367 (1943). While there are instances in which state law may be adopted as the federal rule of decision, see *United States* v. *Yazell*, 382 U. S. 341 (1966), this case presents no compelling reason for doing so. A single nationwide rule would be preferable to one turning on state law, and the incorporation of state law would not give due regard to the federal interest in maintaining the apportionment of responsibility Congress devised in the DRA. Finally, application of a federal rule would not "disrupt commercial relationships predicated on state law," *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 729 (1979) (footnote omitted), since state law would not of its own force govern contracts between a State and the Federal Government.

Given that state law may neither govern of its own force nor be adopted as the federal rule of decision, it remains for us to apply the federal rule. In *Board of Comm'rs of Jackson County* v. *United States*, 308 U. S. 343 (1939), this Court addressed the issue. There, the Court considered whether the political subdivision of a State should be liable to the United States for prejudgment interest on a tax refund owed to a Native American on whose behalf the Federal Government had brought suit. The Court held that prejudgment interest would not be assessed. While the Court noted that certain defenses asserted by States were ineffective as against the Federal Government because of the historic immunity of the sovereign from those defenses, *id.*, at 351, it determined that interest, which lacked comparable historical roots, could not simply be required with respect to all claims by the United States against a State or its political subdivision. It therefore held that, before applying the usual rule regarding prejudgment interest as against a private party to a State, a federal court should consider the interests of the two governments involved. *Id.*, at 350. Noting that aggrieved taxpayers who were not Native Americans were not,

under state law, entitled to interest on tax refunds, *id.*, at 349, the Court concluded that individuals whose rights to a state tax refund arose under federal law should not be put in a better position than taxpayers whose rights arose under state law. *Id.*, at 352. The Court further reasoned that it would be inequitable to award interest because the United States had not moved for eight years to collect the money owed by the county. *Ibid.*

Application of this analysis to the present case indicates that prejudgment interest should be required. No state policy compels any deviation from the longstanding rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money. *Royal Indemnity Co.* v. *United States*, *supra*, at 295–297. Moreover, federal policy plainly calls for an award of interest. The purpose of the DRA was not to relieve States of the entire burden of disaster relief, but to apportion that responsibility between the State and Federal Governments. See, *e. g.*, §§ 101(a)(2) and (b) (Act was intended "to assist the efforts of the affected States," and to provide "an orderly and continuing means of assistance by the Federal Government to State and local governments"); § 102(1) (Governor of any State in which a disaster occurs must certify the need for federal disaster assistance and "giv[e] assurance of the expenditure of a reasonable amount of the funds of such State, its local governments, or other agencies for alleviating the damage . . . resulting from such catastrophe"). Section 226(a) of the DRA reflects the statute's allocative intent; it explicitly states that the Federal Government is not to bear the costs of site preparation for temporary housing for disaster victims. Prejudgment interest is an element of complete compensation, see, *e. g.*, *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 655–656, and n. 10 (1983);[2] fully repaying the Federal Government for

[2] Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is

any costs of site preparation will further the distribution of the burdens of disaster relief that Congress intended.[3]

This federal interest in complete compensation is likely to be present in any ordinary commercial contractual arrangement between a State and the Federal Government. In such a situation, it is also difficult to imagine a state interest that would justify relieving the State of its obligation to compensate the Federal Government fully for its efforts. Here, the State asserts none, except its understandable interest in not paying any more than it has to. The State argues that it should be exempt from paying prejudgment interest to the United States because, under its own law, it may not be held liable for interest unless it has consented to be. See *Guaranty Trust Co. of New York* v. *West Virginia Turnpike Comm'n*, 144 W. Va. 266, 271, 107 S. E. 2d 792, 796 (1959). But the source of this exemption is the State's sovereign immunity, see *id.*, at 274–275, 107 S. E. 2d, at 797–798; since the State must consent to be sued by private parties, it may consent in a limited fashion and refuse to be liable for prejudgment interest. Because States have no sovereign immunity as against the Federal Government, *United States* v. *Texas*, 143 U. S. 621, 646 (1892), any rule exempting a sovereign from the payment of prejudgment interest not only does not apply of its own force to the State's obligations to the Federal Government, cf. *Library of Congress* v. *Shaw*, 478 U. S. 310 (1986),[4] but also does not represent a policy

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entered, thereby achieving full compensation for the injury those damages are intended to redress. See Comment, Prejudgment Interest: Survey and Suggestion, 77 Nw. U. L. Rev. 192 (1982).

[3] The District Court held that whether interest had to be paid depended on a balancing of equities between the parties; the Court of Appeals rejected such an approach, as do we. This is not to say that an equitable consideration such as laches cannot bar an otherwise valid claim for interest, see *Board of Comm'rs of Jackson County* v. *United States*, 308 U. S. 343, 352–353 (1939).

[4] Petitioners contend that *United States* v. *North Carolina*, 136 U. S. 211 (1890), establishes that a State may not be liable for interest, even to

the federal courts are obliged to further.[5] Cf. *Board of Comm'rs of Jackson County*, 308 U. S., at 349, 352; *United States* v. *Yazell*, 382 U. S., at 352 (while courts must show "solicitude for state interests, particularly in the field of family and family-property arrangements," these interests may be overridden to avoid injury to "clear and substantial interests of the National Government"). Accordingly, we hold that West Virginia may under the circumstances of this case be held liable for prejudgment interest.[6]

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the United States, unless it consents either by statute or in a form authorized by statute. That case was decided before *United States* v. *Texas*, 143 U. S. 621 (1892), in which this Court held dispositively that States retain no sovereign immunity as against the Federal Government. We do not speculate as to whether the result in *United States* v. *North Carolina* could have been sustained on a rationale other than the one the Court articulated there.

[5] West Virginia does not have a general policy against prejudgment interest. Under West Virginia law, such interest has been available by statute in contract actions between private parties since 1868. See W. Va. Code § 56–6–27 (1966) (the jury in all contract actions "shall find the aggregate of principal and interest due at the time of the trial"); W. Va. Code, Ch. 131, § 14 (1923) (same); W. Va. Code, Ch. 120, § 14 (1882) (same); W. Va. Code, Ch. 131, § 14 (1868) (same). Moreover, in 1981, W. Va. Code § 56–6–31 was amended to provide for prejudgment interest in cases other than contract actions, except where otherwise provided by law, where a judgment provided for special damages as defined in the statute, or liquidated damages. W. Va. Code § 56–6–31 (Supp. 1986).

[6] We decline to attribute any significance for purposes of this case to the Act of Jan. 12, 1983, Pub. L. 97–452, 96 Stat. 2467. This statute prescribes the interest payable by "person[s]" to the Federal Government, 31 U. S. C. § 3717(a)(1), but excludes from the definition of "person" any "agency . . . of a State government, or of a unit of general local government." 31 U. S. C. § 3701(c). As stated in § 3717(g)(2), this statute does not apply to claims arising under contracts entered into before October 25, 1982, and therefore has no force here. We can draw no inference about Congress' comprehension of the federal common law of interest from its enactment, without any discernible legislative history, of a definitional section excluding state agencies from those "persons" statutorily required to pay interest on debts owed to the Federal Government. Moreover, we venture no opinion regarding the question whether this enactment was in-

We recognize that our holding may work a hardship upon the citizens of West Virginia, who have already suffered greatly as a result of the tragedies that gave rise to this litigation. But the solution for that problem must lie with Congress and not the courts. The DRA expresses a clear policy that responsibility for disaster relief should be apportioned in a particular way between the State and Federal Governments. A remedy for any asserted unfairness in this apportionment must be sought through the political process. The judgment of the Court of Appeals is

Affirmed.

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tended to abrogate or leave intact the federal common law governing when a State must pay interest to the Federal Government. See *Pennsylvania Dept. of Public Welfare* v. *United States*, 781 F. 2d 334, 341–342 (CA3 1986); *Perales* v. *United States*, 598 F. Supp. 19, 23–24 (SDNY), aff'd, 751 F. 2d 95 (CA2 1984) *(per curiam)*.

GRIFFITH *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 85–5221. Argued October 14, 1986—Decided January 13, 1987*

In *Batson* v. *Kentucky*, 476 U. S. 79, the Court ruled that a state criminal defendant could establish a prima facie case of racial discrimination violative of the Fourteenth Amendment, based on the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury venire, and that, once the defendant had made the prima facie showing, the burden shifted to the prosecution to come forward with a neutral explanation for those challenges. These cases concern the question whether that ruling applies to cases pending on direct review or not yet final when *Batson* was decided. In No. 85–5221, petitioner's robbery conviction in a Kentucky state court was affirmed by the Kentucky Supreme Court, which rejected petitioner's claim that the prosecutor's use of peremptory challenges to strike prospective black jurors deprived petitioner, a black person, of guaranteed equal protection. Similarly, in No. 85–5731, petitioner's conviction in Federal District Court on narcotics charges was affirmed by the Court of Appeals, which rejected petitioner's claim that the prosecutor's use of peremptory challenges to exclude black jurors, combined with his call to the jury clerk, violated the right of petitioner, a black person, to an impartial jury. The petitions for certiorari in both cases were filed in this Court before *Batson* was decided.

Held: A new rule for the conduct of criminal prosecutions, such as the ruling in *Batson*, applies retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. Pp. 320–328.

(a) Failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. After this Court has announced a new rule in the case selected for review, the integrity of judicial review requires the Court to apply that rule to all similar cases pending on direct review. In addition, selective application of a new rule violates the principle of treating similarly situated defendants the same. Pp. 320–326.

(b) An exception to the general principle that a new rule governing criminal procedure should be retroactive to cases pending on direct re-

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*Together with No. 85–5731, *Brown* v. *United States*, on certiorari to the United States Court of Appeals for the Tenth Circuit.

view, based solely on the fact that the new rule is a "clear break" with the past, is inappropriate. The principle that this Court does not disregard current law when it adjudicates a case pending before it on direct review applies regardless of the specific characteristics of the new rule announced by the Court. Further, the use of a "clear break" exception creates the same problem of not treating similarly situated defendants the same. The fact that the new rule may constitute a clear break with the past has no bearing on the "actual inequity that results" when only one of many similarly situated defendants receives the benefit of the new rule. Pp. 326–328.

No. 85–5221, and No. 85–5731, 770 F. 2d 912, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, STEVENS, and SCALIA, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 328. REHNQUIST, C. J., filed a dissenting opinion, *post*, p. 329. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 329.

J. Vincent Aprile II argued the cause for petitioner in No. 85–5221. With him on the brief were *Larry H. Marshall* and *JoAnne M. Yanish*. *Fred Haddad* argued the cause and filed a brief for petitioner in No. 85–5731.

Paul W. Richwalsky, Jr., Assistant Attorney General of Kentucky, argued the cause for respondent in No. 85–5221. With him on the brief were *David L. Armstrong*, Attorney General, and *David K. Martin*, Assistant Attorney General. *Deputy Solicitor General Bryson* argued the cause for the United States. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Trott*, and *Roy T. Englert, Jr.*†

†*Julius LeVonne Chambers*, *Charles Stephen Ralston*, and *Steven L. Winter* filed a brief for the NAACP Legal Defense & Educational Fund, Inc., et al. as *amici curiae* urging reversal in both cases.

Frances Baker Jack filed a brief for the National Association of Criminal Defense Lawyers, Inc., as *amicus curiae* in both cases.

Briefs of *amici curiae* in No. 85–5221 were filed for the State of North Carolina et al. by *Lacy H. Thornburg*, Attorney General of North Carolina, *Joan H. Byers*, Special Deputy Attorney General, *Charles A. Graddick*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *John Steven Clark*, Attorney General of Arkansas, *John I. Kelly*, Chief State's Attorney of Connecticut, *Charles M. Oberly*, Attorney

JUSTICE BLACKMUN delivered the opinion of the Court.

These cases, one state and one federal, concern the retrospective application of *Batson* v. *Kentucky*, 476 U. S. 79 (1986).

In *Batson*, 476 U. S., at 96–98, this Court ruled that a defendant in a state criminal trial could establish a prima facie case of racial discrimination violative of the Fourteenth Amendment, based on the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury venire, and that, once the defendant had made the prima facie showing, the burden shifted to the prosecution to come forward with a neutral explanation for those challenges. In the present cases we consider whether that ruling is applicable to litigation pending on direct state or federal review or not yet final when *Batson* was decided. We answer that question in the affirmative.

I

A. *No. 85–5221.* Petitioner Randall Lamont Griffith, a black person, was indicted in 1982 in the Circuit Court of Jefferson County, Ky. (the same court where Batson was tried), on charges of first-degree robbery, theft by unlawful taking,

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General of Delaware, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *Stephen H. Sachs*, Attorney General of Maryland, *Edwin L. Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Michael Turpen*, Attorney General of Oklahoma, *Travis Medlock*, Attorney General of South Carolina, *W. J. Michael Cody*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *David L. Wilkinson*, Attorney General of Utah, *Mary Sue Terry*, Attorney General of Virginia, and *Archie G. McClintock*, Attorney General of Wyoming; for the Lawyers' Committee for Civil Rights under Law by *Barry Sullivan*, *Marshall J. Schmitt*, *Harold R. Tyler, Jr.*, *James Robertson*, *Norman Redlich*, *William L. Robinson*, and *Judith A. Winston;* and for the National Legal Aid and Defender Association by *Patricia Unsinn.*

and being a persistent felony offender in the second degree. App. 2. On the first day of trial, the prosecution and defense attorneys conducted *voir dire* examination of the jury venire and exercised their peremptory challenges.[1] The prosecution used four of its five allotted challenges to strike four of the five prospective black jurors. The defense used eight of its allotted nine challenges to strike prospective white jurors. There were two duplicate strikes. The two extra jurors who remained because of the duplicate strikes, one of whom was a black person, then were removed by random draw.[2] Thus, no black person remained on the jury. *Id.*, at 5, 12–13.

Defense counsel expressed concern that Griffith was to be tried by an all-white jury. He asked the court to request the prosecutor to state his reasons for exercising peremptory challenges against the four prospective black jurors. The request was refused. *Id.*, at 13. Counsel then moved for discharge of the panel, alleging that the prosecutor's use of peremptory challenges to remove all but one of the prospective black jurors constituted a violation of Griffith's Sixth and Fourteenth Amendment rights. *Id.*, at 15. The court denied the motion. The jury returned a verdict of guilty on the charge of first-degree robbery and fixed petitioner's punishment at 10 years' imprisonment.[3] The jury then found petitioner guilty of being a persistent felony offender, and, pur-

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[1] In Kentucky, upon the completion of *voir dire*, the parties simultaneously exercise their respective peremptory challenges. Each side strikes names from the list of jurors who have been qualified and presents the strikes to the court. Ky. Rule Crim. Proc. 9.36(2).

[2] "If the number of prospective jurors remaining on the list [after peremptory challenges] exceeds the number of jurors to be seated, the cards bearing numbers identifying the prospective jurors [are] placed in a box" and the clerk of the court draws at random the number of cards necessary "to reduce the jury to the number required by law." *Ibid.*

[3] Before submitting the case to the jury, the trial court granted Griffith's request for a directed verdict of acquittal on the charge of theft by unlawful taking. See Tr. 204–206.

suant to Ky. Rev. Stat. § 532.080 (1985), enhanced his sentence to 20 years' imprisonment.

The Supreme Court of Kentucky, with an unpublished memorandum opinion, affirmed the judgment of conviction. App. 17. The court rejected petitioner's claim that the prosecutor's use of peremptory challenges deprived him of guaranteed equal protection. It relied on *Swain* v. *Alabama*, 380 U. S. 202 (1965), where this Court ruled that a black defendant did not establish a violation of the Equal Protection Clause solely on proof of the prosecutor's use of peremptory challenges to strike black jurors at the defendant's own trial. *Id.*, at 221–222. The Court noted, however, that an inference of purposeful discrimination could be raised where a prosecutor had engaged in a pattern of challenging black jurors in a series of cases. See *id.*, at 223–224. The Kentucky court concluded that *Swain* disposed of petitioner's claim and it "decline[d] to go further than the *Swain* court." App. 18.

Griffith timely filed here a petition for a writ of certiorari. While his petition was pending, this Court decided *Batson* v. *Kentucky*, *supra*, where it rejected a portion of the reasoning of *Swain* v. *Alabama* on which the Kentucky court had relied. 476 U. S., at 89–96. Two months later, in *Allen* v. *Hardy*, 478 U. S. 255 (1986) *(per curiam)*, we held that the ruling in *Batson* was not to be applied retroactively to a case on federal habeas review. We granted certiorari in Griffith's case, 476 U. S. 1157 (1986), limited to the question whether the ruling in *Batson* applies retroactively to a state conviction pending on direct review at the time of the *Batson* decision.

B. *No. 85–5731.* In 1984, petitioner Willie Davis Brown, a black person, was convicted by a jury in the United States District Court for the Western District of Oklahoma on narcotics charges. During jury selection, two venire panels were assembled. 6 Record 2–10.[4] There were six prospec-

[4] The number of prospective jurors in the first venire who were excused for cause resulted in a remaining number insufficient to constitute a full petit jury. 6 Record 9–10.

tive black jurors in the total venire. Four were excused for cause by the court and the other two were excused by the prosecutor's use of peremptory challenges. *Id.*, at 20.[5] Defense counsel objected to the prosecutor's use of peremptory challenges to strike the black persons from the jury, claiming that petitioner was thereby denied a jury representative of the community. *Id.*, at 20–21. No action was taken in response to that objection.

As prospective jurors were being assembled for the second venire panel, the prosecutor called the jury clerk to inquire about the racial composition of the additional venire. At a hearing held later while the jury was deliberating, there was evidence that the prosecutor said to the clerk: "We would like to have as few black jurors as possible." App. 51. The clerk testified, however, that she remembered the prosecutor's comment to be: "Don't get any blacks on this jury." *Id.*, at 38–39. The clerk went on to say that she did not alter the jury selection in any way in response to the prosecutor's comment. *Id.*, at 44–45. The District Court concluded that the prosecutor's contact with the jury clerk "would have to be looked at and dealt with by someone," *id.*, at 44, inasmuch as it fell "into the category of possible prosecutorial misconduct," *id.*, at 46, but that it did not affect the integrity of the selection of the jury. *Id.*, at 45. The court therefore concluded that a new trial would not be necessary if the jury convicted petitioner. *Id.*, at 46.

The United States Court of Appeals for the Tenth Circuit affirmed the judgment of conviction. 770 F. 2d 912 (1985). It rejected Brown's claim that the prosecutor's use of peremptory challenges to exclude prospective black jurors,

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[5] There is some confusion as to the number of prospective black jurors in the total venire. According to a statement in the record, there were six in the two panels. *Id.*, at 20. At oral argument, counsel for petitioner Brown stated that five had been called. Tr. of Oral Arg. 3. There appears to be agreement, however, that two black jurors were excused by the prosecutor's use of peremptory challenges. See *ibid.*; 6 Record 20; App. 14.

combined with his call to the jury clerk, violated petitioner's right to an impartial jury. The court concluded that Brown had not met *Swain*'s threshold requirement that petitioner must show a systematic and intentional course of conduct by the prosecutor calculated to exclude black jurors in "case after case." 770 F. 2d, at 914. It further concluded that the communication by the prosecutor to the jury clerk did not suggest a pattern of systematic exclusion of black jurors. Although the court observed that the prosecutor's action was "improper" and "must be condemned," *ibid.*, it concluded, as had the District Court, that the prosecutor's request had no effect on the selection of Brown's jury.

Prior to our *Batson* decision, petitioner timely filed with this Court a petition for a writ of certiorari. We granted certiorari, 476 U. S. 1157 (1986), again limited to the question whether the ruling in *Batson* applies retroactively to a federal conviction then pending on direct review. The case was set for argument in tandem with Griffith's case.

II

Twenty-one years ago, this Court adopted a three-pronged analysis for claims of retroactivity of new constitutional rules of criminal procedure. See *Linkletter* v. *Walker*, 381 U. S. 618 (1965). In *Linkletter*, the Court held that *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which extended the Fourth Amendment exclusionary rule to the States, would not be applied retroactively to a state conviction that had become final before *Mapp* was decided. The Court explained that "the Constitution neither prohibits nor requires retrospective effect" of a new constitutional rule, and that a determination of retroactivity must depend on "weigh[ing] the merits and demerits in each case." 381 U. S., at 629. The Court's decision not to apply *Mapp* retroactively was based on "the purpose of the *Mapp* rule; the reliance placed upon the [previous] doctrine; and the effect on the administration of justice of a retrospective application of *Mapp*." 381 U. S., at 636. See also

Stovall v. *Denno*, 388 U. S. 293, 297 (1967) (retroactivity depends on "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards").

Shortly after the decision in *Linkletter*, the Court held that the three-pronged analysis applied both to convictions that were final[6] and to convictions pending on direct review. See *Johnson* v. *New Jersey*, 384 U. S. 719, 732 (1966); *Stovall* v. *Denno*, 388 U. S., at 300. In the latter case, the Court concluded that, for purposes of applying the three factors of the analysis, "no distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review." *Ibid.* Thus, a number of new rules of criminal procedure were held not to apply retroactively either to final cases or to cases pending on direct review. See, *e. g.*, *Stovall* v. *Denno*, *supra*; *DeStefano* v. *Woods*, 392 U. S. 631, 635, n. 2 (1968); *Desist* v. *United States*, 394 U. S. 244, 253–254 (1969); *Daniel* v. *Louisiana*, 420 U. S. 31 (1975) *(per curiam)*.

In *United States* v. *Johnson*, 457 U. S. 537 (1982), however, the Court shifted course.[7] In that case, we reviewed at some length the history of the Court's decisions in the area of retroactivity and concluded, in the words of Justice Harlan: "'"[R]etroactivity" must be rethought.'" *Id.*, at 548 (quoting *Desist* v. *United States*, 394 U. S., at 258 (dissenting opinion)). Specifically, we concluded that the retroactiv-

[6] By "final," we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. See *United States* v. *Johnson*, 457 U. S. 537, 542, n. 8 (1982) (citing *Linkletter* v. *Walker*, 381 U. S. 618, 622, n. 5 (1965)).

[7] In *United States* v. *Johnson*, the Court held that the Fourth Amendment ruling announced in *Payton* v. *New York*, 445 U. S. 573 (1980), prohibiting police from making a warrantless, nonconsensual entry into a suspect's home for the purpose of making a routine felony arrest, applied retroactively to a case pending on direct appeal.

ity analysis for convictions that have become final must be different from the analysis for convictions that are not final at the time the new decision is issued.[8] We observed that, in a number of separate opinions since *Linkletter*, various Members of the Court "have asserted that, at a minimum, all defendants whose cases were still pending on direct appeal at the time of the law-changing decision should be entitled to invoke the new rule." 457 U. S., at 545, and n. 9 (collecting opinions).[9] The rationale for distinguishing between cases that have become final and those that have not, and for applying new rules retroactively to cases in the latter category, was explained at length by Justice Harlan in *Desist* v. *United States*, 394 U. S., at 256 (dissenting opinion), and in *Mackey* v. *United States*, 401 U. S. 667, 675 (1971) (opinion concurring in judgment). In *United States* v. *Johnson*, we embraced to a significant extent the comprehensive analysis presented by Justice Harlan in those opinions.

In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. First, it is a settled principle that this Court adjudicates only "cases" and "controversies." See U. S. Const., Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have

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[8] We noted in *Johnson* that our review did not address the area of civil retroactivity. See 457 U. S., at 563. That area continues to be governed by the standard announced in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971).

[9] See, among others, *Brown* v. *Louisiana*, 447 U. S. 323, 337 (1980) (POWELL, J., with whom STEVENS, J., joined, concurring in judgment); *Harlin* v. *Missouri*, 439 U. S. 459, 460 (1979) (POWELL, J., concurring in judgment); *Hankerson* v. *North Carolina*, 432 U. S. 233, 245 (1977) (MARSHALL, J., concurring in judgment); *id.*, at 246 (POWELL, J., concurring in judgment).

decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review. Justice Harlan observed:

> "If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." *Mackey* v. *United States*, 401 U. S., at 679 (opinion concurring in judgment).

As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule." *Ibid.* See *United States* v. *Johnson*, 457 U. S., at 546–547, 555.

Second, selective application of new rules violates the principle of treating similarly situated defendants the same. See *Desist* v. *United States*, 394 U. S., at 258–259 (Harlan, J., dissenting). As we pointed out in *United States* v. *Johnson*, the problem with not applying new rules to cases pending on direct review is "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule. 457 U. S., at 556, n. 16 (emphasis in original). Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: "The time for toleration has come to an end." *Ibid.*

In *United States* v. *Johnson*, our acceptance of Justice Harlan's views led to the holding that "subject to [certain exceptions], a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." *Id.*, at 562. The exceptions to which we referred related to three categories in which we concluded that existing precedent established threshold tests for the retroactivity analysis. In two of these categories, the new rule already was retroactively applied: (1) when a decision of this Court did nothing more than apply settled precedent to different factual situations, see *id.*, at 549, and (2) when the new ruling was that a trial court lacked authority to convict a criminal defendant in the first place. See *id.*, at 550.[10]

The third category—where a new rule is a "clear break" with past precedent—is the one at issue in these cases. We described it in *United States* v. *Johnson*, 457 U. S., at 549–550:

> "[W]here the Court has expressly declared a rule of criminal procedure to be 'a clear break with the past,' *Desist* v. *United States*, 394 U. S., at 248, it almost invariably has gone on to find such a newly minted principle nonretroactive. See *United States* v. *Peltier*, 422 U. S. 531, 547, n. 5 (1975) (BRENNAN, J., dissenting) (collecting cases). In this . . . type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the '"new" constitutional interpretatio[n] . . . so change[s] the law that prospectivity is arguably the proper course,' *Williams* v. *United States*, 401 U. S., at 659 (plurality opinion). Once the Court has found that the new rule was unanticipated, the second and third *Stovall* factors—reliance by law enforcement authorities

[10] These two categories, in which new rules are automatically applied retroactively, are not affected in any way by our decision today.

> on the old standards and effect on the administration of justice of a retroactive application of the new rule—have virtually compelled a finding of nonretroactivity. See, *e. g.*, *Gosa* v. *Mayden*, 413 U. S., at 672–673, 682–685 (plurality opinion); *Michigan* v. *Payne*, 412 U. S., at 55–57."

Thus, we recognized what may be termed a "clear break exception." Under this exception, a new constitutional rule was not applied retroactively, even to cases on direct review, if the new rule explicitly overruled a past precedent of this Court, or disapproved a practice this Court had arguably sanctioned in prior cases, or overturned a longstanding practice that lower courts had uniformly approved. *Id.*, at 551. The Fourth Amendment ruling in *Payton* v. *New York*, 445 U. S. 573 (1980), with which *United States* v. *Johnson* was concerned, was not a clear break in any of these senses, and thus its retroactivity status was not "effectively preordained" by falling within the "clear break" exception. 457 U. S., at 553–554.

In *Shea* v. *Louisiana*, 470 U. S. 51 (1985), we applied *United States* v. *Johnson* and held that the Fifth Amendment rule announced in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), which prohibited the use, after a suspect had requested counsel, of a confession obtained by police-instigated interrogation without the suspect's attorney's being present, was retroactive to cases on direct review when *Edwards* was decided. Using *Johnson*'s rationale, we concluded there was nothing about a Fourth Amendment rule that suggested it should be given greater retroactive effect than a Fifth Amendment rule. 470 U. S., at 59. In addition, as in *United States* v. *Johnson*, we concluded that the new rule did not fall within the "clear break" exception. The previous Term, in *Solem* v. *Stumes*, 465 U. S. 638, 647 (1984), the Court had explicitly recognized that *Edwards* was "not the sort of 'clear break' case that is almost automatically non-

retroactive."[11] Although, in *Shea*, we expressed some doubt as to "the merits of a different retroactivity rule for cases" in which a new rule is a clear break with the past, we explained that "we have no need to be concerned with the question here." 470 U. S., at 59, n. 5.

III

The question whether a different retroactivity rule should apply when a new rule is a "clear break" with the past, however, is squarely before us in the present cases. In *Allen* v. *Hardy*, 478 U. S. 255 (1986), a case which was here on federal habeas, we said that the rule in *Batson* "is an explicit and substantial break with prior precedent" because it "overruled [a] portion of *Swain*." 478 U. S., at 258.[12] We therefore now reexamine the rationale for maintaining a "clear break" exception to the general proposition that new rules governing criminal procedure should be retroactive to cases pending on direct review. For the same reasons that persuaded us in *United States* v. *Johnson* to adopt different conclusions as to convictions on direct review from those that already had become final, we conclude that an engrafted exception based solely upon the particular characteristics of the new rule adopted by the Court is inappropriate.

First, the principle that this Court does not disregard current law, when it adjudicates a case pending before it on direct review, applies regardless of the specific characteristics of the particular new rule announced. The Court recognized in *United States* v. *Johnson* that the fact that a new rule is a clear break with the past is relevant primarily because it implicates the second and third *Stovall* factors of reliance by law enforcement officials and the burden on the administra-

[11] In *Solem* v. *Stumes* the Court concluded that the rule announced in *Edwards* was not retroactive to a conviction that had become final.

[12] Petitioner Griffith argues that the *Batson* ruling was not a "clear break" with the past because it did not announce a new principle of constitutional law under the Equal Protection Clause. Whatever the merits of that argument might be, it is foreclosed by *Allen* v. *Hardy*.

tion of justice imposed by retroactive application. But even if these factors may be useful in deciding whether convictions that already have become final should receive the benefit of a new rule, the "clear break" exception, derived from the *Stovall* factors, reintroduces precisely the type of case-specific analysis that Justice Harlan rejected as inappropriate for cases pending on direct review.

Second, the use of a "clear break" exception creates the same problem of not treating similarly situated defendants the same. James Kirkland Batson, the petitioner in *Batson* v. *Kentucky*, and Randall Lamont Griffith, the petitioner in the present Kentucky case, were tried in Jefferson Circuit Court approximately three months apart.[13] The same prosecutor exercised peremptory challenges at the trials. It was solely the fortuities of the judicial process that determined the case this Court chose initially to hear on plenary review. JUSTICE POWELL has pointed out that it "hardly comports with the ideal of 'administration of justice with an even hand,'" when "one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine." *Hankerson* v. *North Carolina*, 432 U. S. 233, 247 (1977) (opinion concurring in judgment), quoting *Desist* v. *United States*, 394 U. S., at 255 (Douglas, J., dissenting). See also *Michigan* v. *Payne*, 412 U. S. 47, 60 (1973) (MARSHALL, J., dissenting) ("Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment"). The fact that the new rule may constitute a clear break with the past has no bearing on the "actual inequity that results" when only

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[13] Batson was tried in February 1984. See App. in *Batson* v. *Kentucky*, O. T. 1985, No. 84-6263, p. 1. Petitioner Griffith was tried in May of that year. App. in No. 85-5221, p. 1. And, for what it may be worth, petitioner Brown was tried in Oklahoma in June 1984. App. in No. 85-5731, p. 2.

one of many similarly situated defendants receives the benefit of the new rule. *United States* v. *Johnson*, 457 U. S., at 556, n. 16 (emphasis omitted).

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. Accordingly, in No. 85–5221, the judgment of the Supreme Court of Kentucky is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion. In No. 85–5731, the judgment of the United States Court of Appeals for the Tenth Circuit is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring.

I join the Court's opinion, and consider it an important step toward ending the confusion that has resulted from applying *Linkletter* v. *Walker*, 381 U. S. 618 (1965), on a case-by-case basis. I concluded in 1977 that the Court would be well advised to adopt Justice Harlan's view as to the retroactive application of our decisions both with respect to cases pending at the time on direct appeal and with respect to cases pending on habeas corpus petitions. See *Hankerson* v. *North Carolina*, 432 U. S. 233, 246 (1977) (concurring in judgment). The Harlan view is stated in *Mackey* v. *United States*, 401 U. S. 667, 675 (1971) (opinion concurring in judgment in *Mackey* and dissenting from judgment in *Williams* v. *United States*, 401 U. S. 646 (1971)); and *Desist* v. *United States*, 394 U. S. 244, 256 (1969) (dissenting opinion). I was persuaded by Justice Harlan's reasoning then, and have followed it since. See *Hankerson* v. *North Carolina*, *supra*; *Harlin* v. *Missouri*, 439 U. S. 459, 460 (1979) (concurring in judgment); *Brown* v. *Louisiana*, 447 U. S. 323, 337 (1980) (con-

curring in judgment); *Solem* v. *Stumes*, 465 U. S. 638, 651 (1984) (concurring in judgment).

As the cases we decide today involve only the retroactivity of decisions pending on direct review, it was not necessary for the Court to express an opinion with respect to habeas corpus petitions. As I read the Court's opinion, this question is carefully left open until it is squarely presented. It is to be hoped that the Court then will adopt the Harlan view of retroactivity in cases seeking relief on habeas petitions. See *Mackey* v. *United States*, *supra*, at 681–695. Under that view, habeas petitions generally should be judged according to the constitutional standards existing at the time of conviction.

CHIEF JUSTICE REHNQUIST, dissenting.

As I stated in my dissenting opinion in *Shea* v. *Louisiana*, 470 U. S. 51, 61 (1985), I am willing to adopt both aspects of the approach to retroactivity propounded by Justice Harlan in his opinion in *Mackey* v. *United States*, 401 U. S. 667, 675 (1971). In Justice Harlan's view, new constitutional rules governing criminal prosecutions should apply retroactively for cases pending on direct appeal when the rule is announced, and, with narrow exceptions, should not apply in collateral proceedings challenging convictions that become final before the rule is announced. The majority today adopts only a portion of this approach. I therefore join JUSTICE WHITE's dissent, agreeing with him that, under the present state of our retroactivity jurisprudence, the majority erred in rejecting the reasons cited in *Allen* v. *Hardy*, 478 U. S. 255 (1986), for making *Batson* v. *Kentucky*, 476 U. S. 79 (1986), nonretroactive.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Last Term this Court decided that the rule announced in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), should not apply on collateral review of convictions that became final before the decision in *Batson* was announced. *Allen* v. *Hardy*, 478

U. S. 255 (1986). In reaching this judgment, the Court weighed the three factors that it has traditionally considered in deciding the retroactivity of a new rule of criminal procedure: "'"(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."'" *Id.*, at 258 (quoting *Solem* v. *Stumes*, 465 U. S. 638, 643 (1984), in turn quoting *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967)). No Justice suggested that this test is unworkable. The question, then, is why the Court feels constrained to fashion a different rule for cases on direct review. The reasons the Court offers are not new, and I find them as unpersuasive today as I have in the past:

> "Two concerns purportedly underlie the majority's decision. The first is that retroactivity is somehow an essential attribute of judicial decisionmaking, and that when the Court announces a new rule and declines to give it retroactive effect, it has abandoned the judicial role and assumed the function of a legislature—or, to use the term Justice Harlan employed in describing the problem, a 'super-legislature.' *Desist* v. *United States*, 394 U. S. 244, 259 (1969) (Harlan, J., dissenting). The second (and not completely unrelated) concern is fairness. It is the business of a court, the majority reasons, to treat like cases alike; accordingly, it is unfair for one litigant to receive the benefit of a new decision when another, identically situated, is denied the same benefit. The majority's concerns are no doubt laudable, but I cannot escape the conclusion that the rule they have spawned makes no sense.
>
> "As a means of avoiding what has come to be known as the super-legislature problem, the rule announced by the majority is wholly inadequate. True, the Court is not and cannot be a legislature, super or otherwise. But I should think that concerns about the supposed usurpa-

tion of legislative authority by this Court generally go more to the substance of the Court's decisions than to whether or not they are retroactive. Surely those who believe that the Court has overstepped the bounds of its legitimate authority in announcing a new rule of constitutional law will find little solace in a decision holding the new rule retroactive. If a decision is in some sense illegitimate, making it retroactive is a useless gesture that will fool no one. If, on the other hand, the decision is a salutary one, but one whose purposes are ill-served by retroactive application, retroactivity may be worse than useless, imposing costs on the criminal justice system that will likely be uncompensated for by any perceptible gains in 'judicial legitimacy.'

. . . . . .

"The claim that the majority's rule serves the interest of fairness is equally hollow. Although the majority finds it intolerable to apply a new rule to one case on direct appeal but not to another, it is perfectly willing to tolerate disparate treatment of defendants seeking direct review of their convictions and prisoners attacking their convictions in collateral proceedings. As I have stated before, see [*United States* v.] *Johnson*, [457 U. S. 537, 566–568 (1982)] (WHITE, J., dissenting); *Williams* v. *United States*, 401 U. S. 646, 656–659 (1971) (plurality opinion), it seems to me that the attempt to distinguish between direct and collateral challenges for purposes of retroactivity is misguided. Under the majority's rule, otherwise identically situated defendants may be subject to different constitutional rules, depending on just how long ago now-unconstitutional conduct occurred and how quickly cases proceed through the criminal justice system. The disparity is no different in kind from that which occurs when the benefit of a new constitutional rule is retroactively afforded to the defendant in whose case it is announced but to no others; the Court's new

approach equalizes nothing except the numbers of defendants within the disparately treated classes." *Shea* v. *Louisiana*, 470 U. S. 51, 62–64 (1985) (WHITE, J., dissenting).[1]

The Court's invocation of fairness also overlooks the fact that it is a fortuity that we overruled *Swain* v. *Alabama*, 380 U. S. 202 (1965), in a case that came to us on direct review. We could as easily have granted certiorari and decided the matter in a case on collateral review, such as *Allen* v. *Hardy*. In that case, the principle of treating like cases alike would dictate that all cases on collateral review receive the benefit of the new rule. I trust that the Court would not go that far in letting the tail wag the dog; good judgment would—I hope—win out over blind adherence to the principle of treating like cases alike. Yet today the Court acts as if

[1] The Court does not in these cases address the differential treatment of cases on direct and collateral review. I adhere to my view that the Court's decisions in *United States* v. *Johnson*, 457 U. S. 537 (1982), and *Shea* v. *Louisiana*, 470 U. S. 51 (1985), provide no satisfactory justification for distinguishing between the two classes of cases. As I stated in *Shea:*

"The majority recognizes that the distinction between direct review and habeas is problematic, but justifies its differential treatment by appealing to the need to draw 'the curtain of finality,' [470 U. S.,] at 60, on those who were unfortunate enough to have exhausted their last direct appeal at the time *Edwards* [v. *Arizona*, 451 U. S. 477 (1981),] was decided. Yet the majority offers no reasons for its conclusion that finality should be the decisive factor. When a conviction is overturned on direct appeal on the basis of an *Edwards* violation, the remedy offered the defendant is a new trial at which any inculpatory statements obtained in violation of *Edwards* will be excluded. It is not clear to me why the majority finds such a burdensome remedy more acceptable when it is imposed on the State on direct review than when it is the result of a collateral attack. The disruption attendant upon the remedy does not vary depending on whether it is imposed on direct review or habeas; accordingly, if the remedy must be granted to defendants on direct appeal, there is no strong reason to deny it to prisoners attacking their convictions collaterally. Conversely, if it serves no worthwhile purpose to grant the remedy to a defendant whose conviction was final before *Edwards*, it is hard to see why the remedy should be available on direct review." *Id.*, at 64–65 (footnote omitted).

it has no choice but to follow a mechanical notion of fairness without pausing to consider "sound principles of decision-making," *Stovall* v. *Denno*, 388 U. S., at 301.

For the foregoing reasons, I would adhere to the approach set out in *Stovall* v. *Denno*, *supra*, at 300, and recognize no distinction for retroactivity purposes between cases on direct and collateral review. But even if I saw some merit in applying the Harlan approach to cases on direct appeal, I would nonetheless preserve the exception for "clear breaks" recognized in *United States* v. *Johnson*, 457 U. S. 537 (1982). Under our precedent, "a decision announcing a new standard 'is almost automatically nonretroactive' where the decision 'has explicitly overruled past precedent.'" *Allen* v. *Hardy*, 478 U. S., at 258 (quoting *Solem* v. *Stumes*, 465 U. S., at 646, 647). As the majority in *Johnson* explained:

> "Once the Court has found that [a] new rule was unanticipated, the second and third *Stovall* factors—reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule—have virtually compelled a finding of non-retroactivity." 457 U. S., at 549–550 (citations omitted).

The Court has already recognized that *Batson* constitutes "an explicit and substantial break with prior precedent," and that "prosecutors, trial judges, and appellate courts throughout our state and federal systems justifiably have relied on the standard of *Swain*." *Allen* v. *Hardy*, *supra*, at 258, 260. The reasons that the Court gave in *Allen* v. *Hardy* for concluding that "retroactive application of the *Batson* rule on collateral review of final convictions would seriously disrupt the administration of justice," 478 U. S., at 260, apply equally to retroactive application of the *Batson* rule on direct review.[2]

[2] "The distinction between direct review and collateral attack may bear some relationship to the recency of the crime; thus, to the extent that the difficulties presented by a new trial may be more severe when the underlying offense is more remote in time, it may be that new trials would tend

The majority knows that it is penalizing justifiable reliance on *Swain*, and in doing so causing substantial disruption in the administration of justice; yet the majority acts as if it has no principled alternative. This is not true; it would be a far sounder rule, and no less principled, to apply the *Stovall* test to determine retroactivity on both direct and collateral review. I respectfully dissent.

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to be somewhat more burdensome in habeas cases than in cases involving reversals on direct appeal. However, this relationship is by no means direct, for the speed with which cases progress through the criminal justice system may vary widely. Thus, if the Court is truly concerned with treating like cases alike, it could accomplish its purpose far more precisely by applying new constitutional rules only to conduct of appropriately recent vintage. I assume, however, that no one would argue for an explicit '5-year-rule,' for example.

. . . . .

"Of course, it will be less burdensome in the aggregate to apply *[Batson]* only to cases pending when *[Batson]* was decided than to give it full retroactive effect; by the same token, it would be less burdensome to apply *[Batson]* retroactively to all cases involving defendants whose last names begin with the letter 'S' than to make the decision fully retroactive. The majority obviously would not countenance the latter course, but its failure to identify any truly relevant distinction between cases on direct appeal and cases raising collateral challenges makes the rule it announces equally indefensible." *Shea* v. *Louisiana*, 470 U. S., at 64, n. 1 (WHITE, J., dissenting).

324 LIQUOR CORP., DBA YORKSHIRE WINE & SPIRITS *v.* DUFFY ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 84–2022. Argued November 3, 1986—Decided January 13, 1987

Under § 101–bb of New York's Alcoholic Beverage Control Law and implementing regulations of the State Liquor Authority (SLA), liquor retailers must charge at least 112 percent of the wholesaler's "posted" bottle price in effect at the time the retailer sells or offers to sell the item. Wholesalers must file monthly "posted" bottle prices and case prices for an item with the SLA, and may reduce the posted case price for an item without reducing its bottle price. Since retailers generally purchase liquor by the case, wholesalers thus can compel retailers to charge more than 112 percent of the actual wholesale cost to the retailer. As a result of appellant retailer's selling certain bottles of liquor for less than 112 percent of the posted bottle price, its license was suspended for 10 days and it forfeited a bond. Appellant sought relief from the penalties on the ground that § 101–bb violated § 1 of the Sherman Act. A New York Supreme Court denied relief, but the Appellate Division reversed. The New York Court of Appeals upheld the validity of § 101–bb and reinstated the penalties. It held that § 101–bb was not immune under the state-action exemption from the antitrust laws set forth in *Parker* v. *Brown*, 317 U. S. 341. The Court of Appeals nevertheless concluded that the statute was a proper exercise of powers reserved to the State by the Twenty-first Amendment.

Held:

1. Section 101–bb is inconsistent with § 1 of the Sherman Act. Resale price maintenance has long been regarded as a *per se* antitrust violation. The New York statute, which applies to all liquor wholesalers and retailers, allows "vertical control" by wholesalers of retail prices. Such industrywide resale price fixing is virtually certain to reduce both interbrand and intrabrand competition, because it prevents wholesalers from allowing or requiring retail price competition. Cf. *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97. Pp. 341–343.

2. New York's pricing system is not valid under the state-action exemption from the antitrust laws. The State's system does meet the first requirement of the two-part test for determining immunity under *Parker* v. *Brown*, *supra*, that the challenged restraint be "one clearly articulated and affirmatively expressed as state policy." However,

New York's liquor pricing system does not meet the second requirement that the State's policy be "actively supervised" by the State itself. New York simply authorizes price setting and enforces the prices established by private parties. The State has displaced competition among liquor retailers without substituting an adequate system of regulation. Cf. *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, *supra*. Pp. 343–345.

3. New York's pricing system is not valid under the Twenty-first Amendment. Although § 2 of the Amendment qualifies the federal commerce power, the Amendment does not operate to "repeal" the Commerce Clause wherever state regulation of intoxicating liquors is concerned. The question in each case is whether the interests implicated by a state regulation are so closely related to the powers preserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies. Pp. 346–352.

(a) The State's asserted interest in protecting small retailers does not suffice to afford immunity from the Sherman Act. Although the New York Court of Appeals correctly concluded that the purpose of the 12 percent minimum markup was to protect those retailers, the court made no findings that the purpose of the "bottle price" definition of cost was to protect small retailers, and cited no legislative or other findings that either the markup or the "bottle price" definition of cost has been effective in preserving the retailers. The State's resale price maintenance system directly conflicts with the "familiar and substantial" federal interest in enforcing the antitrust laws. Pp. 348–351.

(b) It is not necessary to consider whether New York's pricing system can be upheld as an exercise of the State's power to promote temperance. The Court of Appeals did not find that the statute was intended to promote temperance, or that it does so. This Court accords great weight to the views of the State's highest court on state-law matters, and customarily accepts the factual findings of state courts in the absence of exceptional circumstances. No such exceptional circumstances appear in this case. Pp. 351–352.

64 N. Y. 2d 504, 479 N. E. 2d 779, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and SCALIA, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 352.

Bertram M. Kantor argued the cause for appellant. With him on the briefs were *Michael H. Byowitz* and *Seymour Howard.*

Deputy Assistant Attorney General Cannon argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried, Assistant Attorney General Ginsburg, Deputy Solicitor General Cohen, Harriet S. Shapiro, Catherine G. O'Sullivan,* and *Andrea Limmer.*

Christopher Keith Hall, Assistant Attorney General of New York, argued the cause for appellees. With him on the brief were *Robert Abrams,* Attorney General, *O. Peter Sherwood,* Solicitor General, and *Richard G. Liskov, Lloyd Constantine,* and *August L. Fietkau,* Assistant Attorneys General.*

JUSTICE POWELL delivered the opinion of the Court.

The State of New York requires retailers to charge at least 112 percent of the "posted" wholesale price for liquor, but permits wholesalers to sell to retailers at less than the "posted" price. The question presented is whether this pricing system is valid under either the state-action exemption from the antitrust laws or the Twenty-first Amendment.

I

A

Wholesalers of liquor in the State of New York must file, or "post," monthly price schedules with the State Liquor Authority (SLA). N. Y. Alco. Bev. Cont. Law (ABC Law)

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*Briefs of *amici curiae* urging affirmance were filed for Peerless Importers, Inc., et al. by *Lawrence Kill, Steven M. Pesner, Anthony A. Dean, Ralph S. Spritzer, Michael Whiteman,* and *Jonathan P. Nye;* and for Wine, Liquor & Distillery Workers Union Local 1, AFL–CIO, et al. by *Victor Feingold.*

Martin P. Mehler filed a brief for Metropolitan Package Store Association, Inc., et al. as *amici curiae.*

§ 101–b (McKinney 1970 and Supp. 1986).[1] The schedules must report, "with respect to each item," "the bottle and case price to retailers." § 101–b(3)(b). The ABC Law itself does not require that the posted case price of an item bear any relation to its posted bottle price. The SLA, however, has promulgated a rule stating that for cases containing 48 or fewer bottles, the posted bottle price multiplied by the number of bottles in a case must exceed the posted case price by a "breakage" surcharge of $1.92. SLA Rule 16.4(e), 9 NYCRR § 65.4(e) (1980).[2]

Retailers of liquor may not sell below "cost." ABC Law, § 101–bb(2).[3] The statute defines "cost" as "the price of such

[1] Section 101–b(3)(b) provides, in part:

"No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in 'combination' with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by each manufacturer selling such brand to retailers and by each wholesaler selling such brand to retailers."

[2] Rule 16.4(e), 9 NYCRR § 65.4(e) (1980), provides:

"For each item of liquor listed in the schedule of liquor prices to retailers there shall be posted a bottle and a case price. The bottle price multiplied by number of containers in the case must exceed the case price by approximately $1.92 for any case of 48 or fewer containers. The figure is to be reached by adding $1.92 to the case price, dividing by the number of containers in the case, and rounding to the nearest cent. Where more than 48 containers are packed in a case, bottle price shall be computed by dividing the case price by the number of containers in the case, rounding to the nearest cent, and adding one cent. Variations will not be permitted without approval of the authority."

[3] Section 101–bb(2) provides, in part:

item of liquor to the retailer plus twelve percentum of such price." § 101–bb(2)(b). "Price," in turn, is defined as the posted bottle price in effect at the time the retailer sells or offers to sell the item. *Ibid.* Although the statute defines retail cost in terms of the wholesaler's posted bottle price, retailers generally purchase liquor by the case. The SLA expressly has authorized wholesalers to reduce, or "post off," the case price of an item without reducing the posted bottle price of the item. SLA Bulletin 471 (June 29, 1973).[4] By reducing the case price without reducing the bottle price,

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"No licensee authorized to sell liquor at retail for off-premises consumption shall sell, offer to sell, solicit an order for or advertise any item of liquor at a price which is less than cost. As used in this section, the term:

. . . . . .

"(b) 'cost' shall mean the price of such item of liquor to the retailer plus twelve percentum of such price, which is declared as a matter of legislative determination to represent the average minimum overhead necessarily incurred in connection with the sale by the retailer of such item of liquor. As used in this paragraph (b) the term "price" shall mean the bottle price to retailers, before any discounts, contained in the applicable schedule filed with the liquor authority pursuant to section one hundred one–b of this chapter by a manufacturer or wholesaler from whom the retailer purchases liquor and which is in effect at the time the retailer sells or offers to sell such item of liquor; except, that where no applicable schedule is in effect the bottle price of the item of liquor shall be computed as the appropriate fraction of the case price of such item, before any discounts, most recently invoiced to the retailer."

[4] Bulletin 471 provides, in part:

"Case prices may be posted off for any given month, or months, without an accompanying reduction in bottle prices. The wholesaler is given these choices during the period of a post-off:

"1. May elect not to reduce the bottle price, in which case the legal bottle price will be the base for the 12% retail mark-up.

"2. May reduce the bottle price to conform with the post-off case price, consistent with Rule 16.4(e), in which case the reduced bottle price will be the base for the 12% mark-up.

"3. May adopt a bottle price any where between the extremes authorized under '1' and '2' above, in which case the reduced bottle price will be the base for the 12% mark-up.

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wholesalers can compel retailers to charge more than 112 percent of the actual wholesale cost. Similarly, because § 101–bb(2)(b) defines "cost" in terms of the posted bottle price in effect when the retailer sells or offers to sell the item, wholesalers can sell retailers large quantities in a month when prices are low and then require the retailers to sell at an abnormally high markup by raising the bottle price in succeeding months. The New York retail pricing system thus permits wholesalers to set retail prices, and retail markups, without regard to actual retail costs. New York wholesalers advertise in trade publications that their "post offs" will guarantee retailers large markups, sometimes in excess of 30 percent. App. 32–35. Wholesalers also advertise that buying large quantities while wholesale prices are low will result in extra retail profits after wholesale prices are raised. App. to Juris. Statement 101A. The effect of this complex of statutory provisions and regulations is to permit wholesalers to maintain retail prices at artificially high levels.

B

Appellant 324 Liquor Corporation sold two bottles of liquor to SLA investigators in June 1981 for less than 112 percent of the posted bottle price. Because the wholesalers had "posted off" their June 1981 case prices without reducing the posted bottle prices, appellant's retail prices represented an 18 percent markup over its actual wholesale cost. As a result of this violation, appellant's license was suspended for 10 days and it forfeited a $1,000 bond. Appellant sought relief from the penalties on the ground that § 101–bb violates § 1 of the Sherman Act, 15 U. S. C. § 1. A New York Supreme Court denied the petition. *324 Liquor Corp.* v. *McLaughlin*, 119 Misc. 2d 746, 464 N. Y. S. 2d 355 (1983). The Appellate Division reversed. *324 Liquor Corp.* v. *McLaughlin*, 102

"Wholesalers of liquor will note that pursuant to these changes no control is placed on the number of consecutive months during which post-offs may be scheduled."

App. Div. 2d 607, 478 N. Y. S. 2d 615 (1984). The New York Court of Appeals upheld the validity of § 101–bb and reinstated the penalties. *J. A. J. Liquor Store, Inc.* v. *New York State Liquor Authority*, 64 N. Y. 2d 504, 479 N. E. 2d 779 (1985). The Court of Appeals held that § 101–bb is not immune under the state-action doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), because the State does not actively supervise the resale price maintenance system. The court nevertheless concluded that the statute is a proper exercise of powers reserved to the State by the Twenty-first Amendment, because "the State interest in protecting retailers which underlies [the statute] is of sufficient magnitude to override the Federal policy expressed in the antitrust laws." *J. A. J. Liquor Store, Inc.* v. *New York State Liquor Authority*, *supra*, at 522, 479 N. E. 2d, at 789. We noted probable jurisdiction, 475 U. S. 1080 (1986), and we now reverse.

II

In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), we invalidated a California statute requiring all producers, wholesalers, and rectifiers of wine to file fair trade contracts or price schedules with the State. *Midcal* establishes the framework for our analysis of New York's liquor pricing system.

A

The "threshold question," in this case as in *Midcal*, is whether the State's pricing system is inconsistent with the antitrust laws. *Id.*, at 102. Section 101–bb imposes a regime of resale price maintenance on all New York liquor retailers. Resale price maintenance has been a *per se* violation of § 1 of the Sherman Act "since the early years of national antitrust enforcement." *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984). See *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 404–409 (1911). Our recent decisions recognize the possibility that a vertical restraint imposed by a *single* manufacturer or whole-

saler may stimulate interbrand competition even as it reduces intrabrand competition. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 51–52 (1977). Accordingly, we have held that concerted nonprice restrictions imposed by a single manufacturer are to be judged under the rule of reason. *Id.*, at 59. We also have held that a single manufacturer may announce resale prices in advance and refuse to deal with those who fail to comply. *Monsanto Co.* v. *Spray-Rite Service Corp.*, *supra*, at 761; *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919). Neither of these qualifications to the *per se* rule applies in this case. Section 101–bb directly restricts retail prices, and retailers are subject to penalties for failure to adhere to the resale price schedules. The New York statute, moreover, applies to *all* wholesalers and retailers of liquor. We have noted that industrywide resale price maintenance also may facilitate cartelization. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, *supra*, at 51, n. 18. Mandatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition. The New York statute specifically forbids retailers from reducing the minimum prices set by wholesalers.

The antitrust violation in this case is essentially similar to the violation in *Midcal*. It is true that the wholesalers in *Midcal* were required to adhere to a single fair trade contract or price schedule for each geographical area. 445 U. S., at 99–100. *Midcal* therefore involved horizontal as well as vertical price fixing. Although the horizontal restraint in *Midcal* may have provided an additional reason for invalidating the statute, our decision in *Midcal* rested on the "vertical control" of wine producers, who held "the power to prevent price competition by dictating the prices charged by wholesalers." *Id.*, at 103. As we explained in *Rice* v. *Norman Williams Co.*, 458 U. S. 654 (1982), the California statute

was invalidated because "it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act." *Id.*, at 659–660 (emphasis in original; footnote omitted). We hold that ABC Law § 101–bb is inconsistent with § 1 of the Sherman Act.[5]

B

In *Parker* v. *Brown*, 317 U. S. 341 (1943), the Court held that the Sherman Act does not apply "to the anticompetitive conduct of a State acting through its legislature." *Hallie* v. *Eau Claire*, 471 U. S. 34, 38 (1985). *Parker* v. *Brown* rests on principles of federalism and state sovereignty. Under those principles, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker* v. *Brown*, 317 U. S., at 351. At the same time, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Ibid.* Our decisions have established a two-part test for determining immunity under *Parker* v. *Brown*. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, *supra*, at 105 (quoting *Lafayette* v. *Louisiana Power & Light Co.*,

[5] The Court of Appeals suggested that the liquor-pricing system prevents "temporary price reductions . . . threatening to drive small retailers out of business and consolidating control of the market in the hands of a relatively few mass distributors who could then dictate prices to the ultimate injury of consumers . . . ." *J. A. J. Liquor Store, Inc.* v. *New York State Liquor Authority*, 64 N. Y. 2d 504, 520, 479 N. E. 2d 779, 788 (1985). In *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986), we recognized that predatory pricing schemes are "rarely tried, and even more rarely successful." *Id.*, at 589. In this case, the possibility of success is practically nonexistent, because liquor retailers are limited to a single outlet. ABC Law § 63.5 (McKinney 1970). In any event, § 101–bb forbids not only predatory pricing, but all price competition among retailers.

435 U. S. 389, 410 (1978) (plurality opinion)). New York's liquor-pricing system meets the first requirement. The state legislature clearly has adopted a policy of resale price maintenance. Just as clearly, however, New York's liquor-pricing system is not actively supervised by the State. As in *Midcal*, the State "simply authorizes price setting and enforces the prices established by private parties."[6] 445

[6] A simple "minimum markup" statute requiring retailers to charge 112 percent of their actual wholesale cost may satisfy the "active supervision" requirement, and so be exempt from the antitrust laws under *Parker* v. *Brown*, 317 U. S. 341 (1943). See *Morgan* v. *Division of Liquor Control, Conn. Dept. of Business Regulation*, 664 F. 2d 353 (CA2 1981) (upholding a simple markup statute). Section 101–bb, however, is not a simple minimum markup statute because it imposes a markup on the "posted bottle price," a price that may greatly exceed what the retailer actually paid for the liquor. As we have explained, *supra*, at 339–340, Bulletin 471 permits wholesalers to reduce the case price—the price actually paid by most retailers—without reducing the bottle price. The New York Court of Appeals expressly held that Bulletin 471 "is consistent with Alcoholic Beverage Control Law § 101–b(3) which does not mandate any price ratio between scheduled case and bottle prices." *J. A. J. Liquor Store, Inc.* v. *New York State Liquor Authority*, *supra*, at 523, 479 N. E. 2d, at 790. We may not "construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974). Appellees nevertheless argue that invalidation of Bulletin 471 does not require invalidation of § 101–bb. Appellees contend that § 101–bb does not prevent the SLA from establishing a relationship between case price and bottle price; indeed, Rule 16.4(e) establishes such a relationship. Brief for Appellees 24–25, n. 37. Invalidation of Bulletin 471 alone, however, would not prevent wholesalers from selling large quantities at low prices in one month, and then requiring retailers to charge abnormally high markups by raising bottle prices in subsequent months. See *supra*, at 340. We cannot accept appellees' suggestion that such unsupervised price fixing should be tolerated as a reasonable accounting method or as a hedge against inflation. See App. to Juris. Statement 101A (advertising a guaranteed 31.3 percent markup on liquor purchased in August 1984 and sold in September 1984). We thus have no occasion to consider whether a simple minimum markup statute would be entitled to antitrust immunity under *Parker* v. *Brown*.

Some States completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4–15, 4–28 (1983). Such comprehensive

U. S., at 105. New York "neither establishes prices nor reviews the reasonableness of the price schedules." *Ibid.* New York "does not monitor market conditions or engage in any 'pointed reexamination' of the program." *Id.*, at 106 (quoting *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 362 (1977)).[7] Each wholesaler sets its own "posted" prices; the State does not control month-to-month variations in posted prices. Nor does the State supervise the wholesaler's decision to "post off," the amount of the "post off," the corresponding decrease, if any, in the bottle price, or the frequency with which a wholesaler posts off. The State has displaced competition among liquor retailers without substituting an adequate system of regulation. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U. S., at 106.[8]

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regulation is immune under *Parker* v. *Brown* because the State substitutes its own power for "unfettered business freedom." See *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978).

[7] In a concurring opinion, Judge Jasen argued that the State actively supervises the liquor-pricing system. *J. A. J. Liquor Store, Inc.* v. *New York State Liquor Authority*, *supra*, at 526–529, 479 N. E. 2d, at 792–794. Judge Jasen noted that the SLA can respond to market conditions by permitting individual wholesalers to depart from their posted prices, ABC Law § 101–b(3)(b), and by permitting individual retailers to sell below the statutory definition of "cost," § 101–bb(3), "for good cause shown." Bulletin 471 itself was issued by the SLA in response to market conditions. Moreover, the state legislature frequently considers proposals to alter the liquor-pricing system. Neither the "monitoring" by the SLA, nor the periodic reexaminations by the state legislature, exerts any significant control over retail liquor prices or markups. Thus, the State's involvement does not satisfy the second requirement of *Midcal*.

[8] The same considerations lead us to reject appellees' contention that there is no "contract, combination . . . , or conspiracy, in restraint of trade." 15 U. S. C. § 1. Where "private actors are . . . granted 'a degree of private regulatory power' . . . the regulatory scheme may be attacked under § 1" as a "hybrid" restraint. *Fisher* v. *Berkeley*, 475 U. S. 260, 268 (1986) (quoting *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 666, n. 1

III

Section 2 of the Twenty-first Amendment reserves to the States the power to regulate, or prohibit entirely, the transportation or importation of intoxicating liquor within their borders.[9] Section 2 "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal*, 445 U. S., at 110. The States' Twenty-first Amendment powers, though broad, are circumscribed by other provisions of the Constitution. See *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 122, n. 5 (1982) (Establishment Clause); *Craig* v. *Boren*, 429 U. S. 190, 204–209 (1976) (Equal Protection Clause); *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1971) (procedural due process); *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341, 345–346 (1964) (Export-Import Clause). Although § 2 directly qualifies the federal commerce power, the Court has rejected the view "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned." *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).[10] Instead, the Court has en-

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(1982) (STEVENS, J., concurring in judgment)). See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951). Our decisions reflect the principle that the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior. See also *Northern Securities Co.* v. *United States*, 193 U. S. 197, 345–346 (1904) (plurality opinion); 1 P. Areeda & D. Turner, Antitrust Law ¶ 209, pp. 60–62 (1978). That principle squarely governs this case.

[9] Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[10] The dissenting opinion concedes that "neither the House of Representatives nor the state ratifying conventions deliberated long on the powers conferred on the States by § 2." *Post*, at 353. It nevertheless maintains that the Senate debates "clearly demonstrate an intent to confer on States complete and exclusive control over the commerce of liquor." *Post*, at 354. We find no such clear demonstration of congressional intent. It is

gaged in a "pragmatic effort to harmonize state and federal powers." *Midcal, supra*, at 109. The question in each case is "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 714 (1984).

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true that Senator Blaine, the Senate sponsor of the Amendment, at one point stated that the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors . . . ." 76 Cong. Rec. 4143 (1933). At another point, however, Senator Blaine appeared to advance a narrower interpretation: "So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line." *Id.*, at 4141.

The dissent also maintains that the behavior of the States following ratification supports the view that States have power to enact laws governing the pricing of liquor free of the strictures of federal antitrust policy. One commentator is quoted as saying that the States adopted " 'bold and drastic experiments' " in price control. *Post*, at 357, quoting De Ganahl, Trade Practice and Price Control in the Alcoholic Beverage Industry, 7 Law & Contemp. Prob. 665, 680 (1940). In the next paragraph, however, this writer states that "[b]ecause the experiments came at a time when neither the fair-trade law nor the constitutional law on liquor was settled . . . there is uncertainty as to the validity of much of this legislation." *Ibid.* When the Twenty-first Amendment was adopted, it was far from clear that the federal commerce power extended to intrastate retail sales of liquor. See *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 542–548 (1935) (holding that the commerce power does not extend to intrastate sales of poultry, even when the poultry has been shipped across state lines). The Miller-Tydings Fair Trade Act of 1937, 50 Stat. 693, moreover, permitted States to authorize agreements prescribing prices for the resale of specified commodities, including liquor. Even after the passage of the Miller-Tydings Act, price control laws were not as universally popular as the dissent implies. In 1940, for example, only 18 of the 45 "wet" States had price stabilization provisions written into their alcoholic beverage statutes, De Ganahl, *supra*, at 680, while in 17 States the State itself monopolized sales of liquor, Shipman, State Administrative Machinery for Liquor Control, 7 Law & Contemp. Prob. 600, 601, n. 5 (1940).

A

The New York Court of Appeals concluded that § 101–bb "was expressly designed to preserve competition in New York's retail liquor industry by stabilizing the retail market and protecting the economic position of small liquor retailers." *J. A. J. Liquor Store, Inc.* v. *New York State Liquor Authority*, 64 N. Y. 2d, at 520, 479 N. E. 2d, at 788. The Court of Appeals traced the recent history of the State's regulation of retail liquor prices. In early 1964, the Moreland Commission completed an extensive study of the state laws governing the sale and distribution of alcoholic beverages. New York State Moreland Comm'n on the Alcoholic Beverage Control Law, Report and Recommendations Nos. 1–3 (1964). "The Commission's major findings were that New York consumers suffered from serious price discrimination when compared to liquor consumers in other States and that a severe lack of competition existed in the New York retail market." *J. A. J. Liquor Store, Inc.* v. *New York State Liquor Authority*, *supra*, at 519, 479 N. E. 2d, at 787. The New York Legislature responded in 1964 by enacting sweeping changes in the ABC Law primarily intended to promote price competition among liquor retailers. *Ibid.* The 1964 version of § 101–bb prohibited retail sales below cost and defined cost as the bottle price in effect when the retailer sells or offers to sell the item. ABC Law § 101–bb (McKinney 1970). During the years between 1964 and 1971, the number of liquor stores in New York declined. The State Senate Excise Committee investigated the decline and concluded that "the mass of small retailers are unable to compete with the large volume outlets that have emerged." New York State Legislature, Senate Excise Committee, Final Report 29–30 (Mar. 5, 1971). In 1971 the legislature enacted the current version of ABC Law § 101–bb to "protec[t] the economic position of small liquor retailers." *J. A. J. Liquor Store, Inc.* v. *New York State Liquor Authority*, *supra*, at 520, 479 N. E. 2d, at 788.

We agree with the New York Court of Appeals that the purpose of the 12-percent minimum markup is to protect small retailers. We have noted that the 12-percent markup is imposed on the "posted bottle price," a price that may differ from the actual wholesale price paid by the retailer. See *supra*, at 339–340. There is no indication in the statute or its legislative history, however, that the purpose of defining cost as "posted bottle price" was to protect small retailers. The New York Legislature first defined cost in terms of posted bottle price in the 1964 amendments to the ABC Law. The purpose of those amendments, as the New York Court of Appeals found, was to increase price competition among liquor retailers. The 1971 amendments simply retained bottle price as the basis of the statutory definition of cost and added 12 percent to reflect the retailer's overhead and operating expenses. Indeed, the legislative Committee that considered the 1971 amendments concluded that the bottle price definition of cost put small retailers at a slight disadvantage. The Committee noted that "[t]he present definition of 'cost' [as] scheduled bottle cost to the retailer does afford some margin of profit to large retailers in particular, and, to a lesser extent, to all retailers who can afford to buy by the case." New York State Senate Excise Committee, Final Report, *supra*, at 8–9. The Committee suggested that "consideration be accorded to . . . [r]evision or elimination of . . . 'post offs' practices that appear to afford discriminatory advantages to possession of great purchasing power." *Id.*, at 41. The Committee did not recommend an amendment to this effect because it considered the matter "outside the scope of the directive given to this Committee." *Ibid.*[11]

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[11] There is no indication that the purpose of Bulletin 471 is to protect small retailers. The Bulletin states that its purpose is to prevent "a situation during post-off periods which resulted in what became known as a 'two bottle' price." App. to Juris. Statement 71A. Although there is no precise explanation of "two bottle pricing" in the record, the caption of Bulletin 471 is "Unlawful Discrimination and Price Scheduling—Bottle Price

In *Midcal*, we found nothing in the record to suggest that California's wine-pricing system actually helped sustain small retailers. 445 U. S., at 113. Similarly, in this case the New York Court of Appeals cited no legislative or other findings that either the minimum markup requirement or the "bottle price" definition of cost has been effective in preserving small retail establishments, and made no findings of its own. Our *Midcal* opinion cites evidence that States with "fair trade laws" not unlike ABC Law § 101–bb actually had higher rates of firm failure, and slower rates of growth of small retail stores, than free trade States in the years between 1956 and 1972. 445 U. S., at 113 (citing S. Rep. No. 94–466, p. 3 (1975)). The only relevant evidence in the record indicates that the number of retail liquor outlets in New York continued to decline between 1970 and 1979. App. to Juris Statement 99A. We are unwilling to assume on the basis of this record that § 101–bb has the effect of protecting small retailers.

In this case, as in *Midcal*, the State's unsubstantiated interest in protecting small retailers "simply [is] not of the same stature as the goals of the Sherman Act." 445 U. S., at 114. New York's resale price maintenance system directly conflicts with the "familiar and substantial" federal interest in enforcement of the antitrust laws. *Id.*, at 110. "Antitrust laws in general, and the Sherman Act in particular . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972). We therefore conclude that the State's asserted interest in

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During Post-Down." *Ibid.* This suggests that the SLA was concerned with ensuring that wholesalers charge the same price to all retailers, and not with the relationship between the retailer's actual cost and the required markup.

protecting small retailers does not suffice to afford immunity from the Sherman Act.[12]

B

Appellees finally argue that § 101–bb furthers the State's interest in promoting temperance. Brief for Appellees 39–44. One would hardly suggest that the New York Legislature set out to promote temperance by increasing the number of retail outlets for liquor. Rather, appellees argue that New York's pricing system has the effect of raising retail prices, and that higher prices decrease consumption of liquor. The New York Court of Appeals did not find that the statute was intended to promote temperance, or that it does so. On the contrary, that court cited the conclusion of the Moreland Commission that higher prices do not decrease consumption of liquor. *J. A. J. Liquor Store, Inc.* v. *New York State Liquor Authority*, 64 N. Y. 2d, at 521, n. 2, 479 N. E. 2d, at 788, n. 2 (citing Moreland Comm'n Report No. 1, at 3, 17). Of course, we are not bound by findings of the Court of Appeals that undercut powers reserved by the Twenty-first Amendment. *Midcal*, *supra*, at 111; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945). We nevertheless accord "great weight to the views of the State's highest court" on state-law matters, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and customarily accept the factual findings of state courts in the absence of exceptional circumstances. *Midcal*, *supra*, at 111–112. Our review of the record discloses no such exceptional circumstances in this case.[13] We therefore do not reach the question whether New

[12] We have no occasion in this case to consider whether the State's interest in protecting small retailers ever could prevail against the federal interest in enforcement of the antitrust laws.

[13] It is far from certain that the New York Legislature intended to promote temperance, or that the retail price maintenance system actually decreases consumption. Section 101–bb, like other sections of the ABC Law, recites that it is enacted "for the purpose of fostering and promoting temperance." ABC Law § 101–bb(1) (McKinney 1970). This statement is not supported by specific findings, or by evidence in the record. In

York's liquor-pricing system could be upheld as an exercise of the State's power to promote temperance.

IV

We conclude that the Twenty-first Amendment provides no immunity for New York's authorization of private, unsupervised price fixing by liquor wholesalers. We therefore reverse the judgment of the New York Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, dissenting.

Immediately after the ratification of the Twenty-first Amendment, this Court recognized that the broad language of § 2 of the Amendment conferred plenary power on the States to regulate the liquor trade within their boundaries. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939); *Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939); *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936). As JUSTICE STEVENS recently observed, however, the Court has, over the years, so "completely distorted the Twenty-

Midcal, we accepted the California Supreme Court's rejection of a similar declaration of legislative purpose. 445 U. S., at 112–114 (discussing *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 457–459, 579 P. 2d 476, 493–494 (1978)). The legislative Report accompanying § 101–bb does not suggest that the amendment was aimed at decreasing consumption. Rather, the Report focuses on the need to protect small retailers. New York State Legislature, Senate Excise Committee, Final Report 30, 37 (Mar. 1971). The Report does express concern over the increase in liquor consumption during the years between 1964 and 1971. *Id.*, at 16. But the Report recognizes the Moreland Commission's finding that higher prices do not reduce consumption, and states that "because of the multiplicity of factors involved and lack of data on specifics, the Committee is unable to determine what portion of such increase is attributable to any particular factors." *Id.*, at 14.

first Amendment" that "[i]t now has a barely discernible effect in Commerce Clause cases." *Newport* v. *Iacobucci*, *ante*, at 98 (dissenting). Because I believe that the Twenty-first Amendment clearly authorized the State of New York to regulate the liquor trade within its borders free of federal interference, I dissent from Part III of the Court's opinion, and would affirm the judgment of the New York Court of Appeals.

I

In *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324 (1964), this Court took a first step toward eviscerating the authority of States to regulate the commerce of liquor. The Court held that the State of New York could not regulate the importation of liquor into that State when the liquor was sold in duty-free shops at the Kennedy Airport. The basis for this decision was the fact that the United States Customs Service already supervised the liquor sold at the airport. Justice Black, who as a Senator was present at the creation of the Twenty-first Amendment, wrote a thoughtful and powerful dissent. After reviewing the legislative history of the Twenty-first Amendment, Justice Black concluded that the Senators who approved the Twenty-first Amendment thought they were returning absolute control over the liquor industry to the States, and "were seeing to it that the Federal Government could not interfere with or restrict the State's exercise of the power conferred by the Amendment." *Id.*, at 338 (dissenting). Because the Court has seen fit in recent years to dismiss this legislative history without analysis as "obscure," *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 274 (1984); *ante*, at 346–347, n. 10, a fresh examination of the origins of the Twenty-first Amendment is in order and long overdue.

Although neither the House of Representives nor the state ratifying conventions deliberated long on the powers conferred on the States by § 2, but see 76 Cong. Rec. 2776 (1933) (statement of Rep. Lea of California that the section was "the

extreme of State rights" because it obligated the Federal Government to assist the enforcement of state laws "however unwise or improvident"), the Senate considered the section in great detail. Those Senate discussions clearly demonstrate an intent to confer on States complete and exclusive control over the commerce of liquor.

When the Senate began its deliberations on the Twenty-first Amendment, the proposed Amendment included a § 3 not present in the adopted Amendment. This section granted the Federal Government concurrent authority over some limited aspects of the commerce of liquor. It provided that "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." *Id.*, at 4138. As Justice Black observed, the proposal "to leave even this remnant of federal control over liquor traffic gave rise to the only real controversy over the language of the proposed Amendment." 377 U. S., at 337. Even Senator Blaine, the Chairman of the Senate Subcommittee that had held hearings on the proposed Amendment, opposed the limited grant of authority to the Federal Government in § 3. According to Senator Blaine, when the Federal Government was organized by the Constitution the States had "surrendered control over and regulation of interstate commerce." 76 Cong. Rec. 4141 (1933). He viewed § 2 of the Amendment as a restoration of the power surrendered by the States when they joined the Union. Section 2 "restor[ed] to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." *Ibid.* In his view, the grant of authority to Congress in § 3 undercut the import of § 2:

> "Mr. President, my own personal viewpoint upon section 3 is that it is contrary to section 2 of the resolution. I am now endeavoring to give my personal views. The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which

> enter the confines of the States. The State under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. Thus the States are granted larger power in effect and are given greater protection, while under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment." *Id.*, at 4143.

Senator Wagner was an especially vigorous opponent of the proposed § 3. In his view, it failed to "correct the central error of national prohibition. It does not restore to the States responsibility for their local liquor problems. It does not withdraw the Federal Government from the field of local police regulation into which it has trespassed." *Id.*, at 4144. In Senator Wagner's view, the danger of § 3 was that even this limited grant of authority to the Federal Government would result in federal control of the liquor trade:

> "If Congress may regulate the sale of intoxicating liquors where they are to be drunk on premises where sold, then we shall probably see Congress attempt to declare during what hours such premises may be open, where they shall be located, how they shall be operated, the sex and age of the purchasers, the price at which the beverages are to be sold. . . .
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> . . . . . .
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> "It is entirely conceivable that in order to protect such a prohibition the courts might sustain the prohibition or regulation of all sales of beverages whether intended to be drunk on the premises or not. And if sales may be regulated, so may transportation and manufacture. . . . If that is to be the history of the proposed amendment—and there is every reason to expect it—then obviously we have expelled the system of national control through the front door of section 1 and readmitted it forthwith through the back door of section 3." *Id.*, at 4147.

Other Senators also expressed the fear that "any grant of power to the Federal Government, even a seemingly narrow one, could be used to whittle away the exclusive control over liquor traffic given the States by Section 2." *Hostetter*, 377 U. S., at 337 (Black, J., dissenting); see 76 Cong. Rec. 4143 (1933) (Sen. Blaine); *id.*, at 4177–4178 (Sen. Black). Still others emphasized the plenary power granted the States by § 2. Senator Walsh, a member of the Subcommittee that had held hearings on the Amendment, said: "The purpose of the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter." *Id.*, at 4219. In response to a question from Senator Swanson, Senator Robinson of Arkansas affirmed that "it is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported." *Id.*, at 4225. Thus, upon the motion of Senator Robinson, the Senate voted to strike § 3 from the proposed Amendment. *Id.*, at 4179.

By emphasizing the importance of the plenary powers granted the States in § 2, and more importantly by removing even the limited grant of authority to Congress contained in § 3, the Senate made manifest its intent to prevent any federal interference with state attempts to regulate the liquor trade. It is difficult to believe that the Senators would have anticipated that a federal statute enacted under the commerce power could ever override the State's power to regulate the liquor trade.

II

The history of the Amendment strongly supports Justice Black's view that the Twenty-first Amendment was intended to return absolute control of the liquor trade to the States, and that the Federal Government could not use its Commerce Clause powers to interfere in any manner with the States' exercise of the power conferred by the Amendment.

Given its desire to confer broad freedom on the States to regulate commerce in intoxicating liquors without federal interference, Congress certainly intended that the States have the power to enact economic regulations governing the pricing of liquor free of federal antitrust policy.

The behavior of the States upon the ratification of the Twenty-first Amendment also supports this view. Contemporaneously with the enactment of the Twenty-first Amendment, a report sponsored by John D. Rockefeller, Jr., recommended that those States that could not muster the political support for state monopolies in the liquor industry should adopt the equivalent solution of price-control laws designed to keep the price of liquor at high levels. R. Fosdick & A. Scott, Toward Liquor Control 52 (1933). According to this report, the "profit motive is the core of the problem." *Id.*, at 61. This profit motive encouraged low prices that stimulated liquor consumption. *Id.*, at 149. Retail prices had a "direct bearing on the amount of consumption," *id.*, at 81, and thus a State could use price-fixing powers "as one of its most effective instruments of control." *Id.*, at 82. The ideas expressed by the Rockefeller Report "were the dominant ideas which took flesh in the post-repeal legislation of the states." Dunsford, State Monopoly and Price-Fixing in Retail Liquor Distribution, 1962 Wis. L. Rev. 454, 464. It is not surprising, therefore, that even before the enactment of the Miller-Tydings Fair Trade Act of 1937, 50 Stat. 693, States exercised their Twenty-first Amendment powers to adopt "bold and drastic experiments in price control," including price posting, regulation by private associations, and mandatory resale price maintenance contracts. De Ganahl, Trade Practice and Price Control in the Alcoholic Beverage Industry, 7 Law & Contemp. Prob. 665, 680 (1940). Thus, the States that ratified the Twenty-first Amendment immediately exercised the authority granted them by § 2 of that Amendment to enact the very type of statute that this Court strikes down today.

With the clear legislative intent to free state regulation of liquor from federal interference, and the immediate enactment of price-control laws by the ratifying States, the better view of the proper resolution of any apparent conflict between the Sherman Act and a state regulation of the liquor trade was expressed by Justice Frankfurter in *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 300–302 (1945) (concurring). In Justice Frankfurter's view, the Twenty-first Amendment accorded States the power to control the liquor traffic "according to their notions of policy freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce." *Id.*, at 300. Because Congress enacted the Sherman Act pursuant to its authority in the Commerce Clause, the Sherman Act must yield to state power drawn from the Twenty-first Amendment. *Id.*, at 301. Thus, Justice Frankfurter concluded:

> "If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. Such state policy can not offend the Sherman Law even though distillers or middlemen agree with local dealers to respect this policy." *Ibid.*

Justice Frankfurter believed that in the absence of a conflict between the state regulatory scheme and the federal antitrust laws, federal antitrust policy was fully applicable even to the intrastate liquor trade. In *Frankfort Distilleries* itself, the State had not authorized the anticompetitive conduct of the respondents. Once a State has exercised its § 2 power, however, "the Sherman Law could not override such exercise of state power." *Id.*, at 302.

Justice Frankfurter was not alone in this view. In repealing the Miller-Tydings Act—which had authorized States to enact fair trade laws—the Senate believed that the States could continue to impose retail price maintenance on liquor retailers. The Report from the Senate Judiciary Committee on the proposal to repeal the Miller-Tydings Act explicitly assured the Senate that the repeal would not change the power of States to impose retail price maintenance on liquor retailers pursuant to the authority granted the States by the Twenty-first Amendment:

> "Liquor will not be affected by the repeal of the fair trade laws in the same manner as other products because the Twenty-First Amendment to the Constitution gives the States broad powers over the sale of alcoholic beverages. Thus, while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the Twenty-First Amendment." S. Rep. No. 94–466, p. 2 (1975).

The history and purpose of the Twenty-first Amendment are a compelling indication of an intent to confer on States the power to regulate trade in liquor. Despite this clear intent, the Court in recent years has used a balancing test to resolve conflicts between federal statutes and state laws enacted pursuant to § 2. In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), and once again today, the Court ventured still further from the intent of the Twenty-first Amendment by adopting an unprecedented test that focuses on the wisdom of the State's exercise of its § 2 powers. For the Court today does not invalidate the ABC Law because it involves an exercise of power outside the scope of the Twenty-first Amendment—indeed, the Court could not do so given the long history of the use of price controls by state liquor authorities. Instead, in a manner reminiscent of the long-repudiated *Lochner* v. *New York*, 198 U. S. 45 (1905), the Court strikes down the ABC Law be-

cause it concludes that the law was not "effective" in preserving small retail establishments or in decreasing alcohol consumption. The proper inquiry, however, is not whether the State of New York chose wisely in enacting a retail price maintenance law, nor whether the State of New York's motivation in doing so was linked to a "central purpos[e]" of the Twenty-first Amendment. The sole "question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution." *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S., at 287 (STEVENS, J., dissenting).

Because the State of New York was plainly exercising its § 2 power to regulate liquor trade, I respectfully dissent.

Syllabus

BURKE, ACTING ARCHIVIST OF THE UNITED STATES, ET AL. *v.* BARNES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85–781. Argued November 4, 1986—Decided January 14, 1987

Congress passed a bill conditioning the continuance of military aid to El Salvador upon the President's semiannual certification of that nation's progress in protecting human rights. The President neither signed the bill nor returned it to the House of Representatives where it had originated, claiming that since Congress had in the meantime adjourned the bill had been subjected to a "pocket veto." Respondent Members of the House then filed suit against petitioners in Federal District Court, challenging the purported "pocket veto." The District Court granted summary judgment for petitioners. The Court of Appeals reversed, holding that the bill had become law despite the President's effort to "pocket-veto" it, but the bill expired by its own terms a few weeks later.

Held: The case is moot. Article III requires that there be a live case or controversy at the time a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment this Court is reviewing. Here, any issues as to whether the bill in question became law were mooted when it expired by its own terms, regardless of whether it had been previously enacted into law or not. Any controversy over petitioner Acting Archivist's failure to publish the bill in the Statutes at Large as a duly enacted law or any dispute as to accounting obligations relating to the expenditure of funds under the bill is not sufficient to keep the case from being moot. Pp. 363–364.

245 U. S. App. D. C. 1, 759 F. 2d 21, vacated and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 365. SCALIA, J., took no part in the consideration or decision of the case.

Assistant Attorney General Willard argued the cause for petitioners. With him on the briefs were *Solicitor General Fried, Deputy Solicitor General Kuhl, Edwin S. Kneedler,* and *William Kanter.*

Morgan J. Frankel argued the cause for respondents. With him on the brief for respondents Barnes et al. were *Michael Davidson*, *Edward M. Kennedy*, and *Michael Ratner*. *Steven R. Ross*, *Charles Tiefer*, and *Michael L. Murray* filed a brief for respondents Speaker of the United States House of Representatives et al.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Both the House of Representatives and the Senate passed a bill, H. R. 4042, 98th Cong., 1st Sess. (1983), conditioning the continuance of United States military aid to El Salvador upon the President's semiannual certification of El Salvador's progress in protecting human rights. The President neither signed the bill nor returned it to the House of Representatives where it had originated, and took the position that because Congress had in the meantime adjourned at the end of its first session the bill had been subjected to a "pocket veto" under Article I, § 7, cl. 2, of the United States Constitution.

Respondents-plaintiffs in this action are 33 individual Members of the House of Representatives who filed suit in the District Court challenging the action of the President in seeking to "pocket-veto" the bill in question. The Senate and the Speaker and Bipartisan Leadership Group of the House of Representatives intervened in support of the plaintiffs and are also respondents here. The District Court granted summary judgment in favor of petitioners-defendants, *Barnes* v. *Carmen*, 582 F. Supp. 163 (DC 1984), but a divided Court of Appeals reversed. *Barnes* v. *Kline*, 245 U. S. App. D. C. 1, 759 F. 2d 21 (1984). The majority concluded that respondents had standing to maintain this action, and that the bill had become a law notwithstanding the President's effort to "pocket-veto" it. The dissenting judge took the view that respondents did not have stand-

**David C. Vladeck* and *Alan B. Morrison* filed a brief for Senator John Melcher et al. as *amici curiae*.

ing to maintain the action. Petitioners Frank G. Burke, Acting Archivist of the United States, and Ronald Geisler, Executive Clerk of the White House, contend in this Court that (a) respondents lacked standing to maintain the action, (b) the Court of Appeals was incorrect in construing the "Pocket Veto" Clause of the Constitution as it did, and (c) the case is moot. We agree with this final contention of petitioners, and hold that the case is moot. We therefore do not reach either of the other contentions of petitioners.

The bill in question expired by its own terms on September 30, 1984, a few weeks after the Court of Appeals entered its judgment. Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing. *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975); *Golden* v. *Zwickler*, 394 U. S. 103, 108 (1969). We therefore analyze this case as if respondents had originally sought to litigate the validity of a statute which by its terms had already expired. In *Diffenderfer* v. *Central Baptist Church of Miami, Florida, Inc.*, 404 U. S. 412 (1972) *(per curiam)*, we stated:

> "The only relief sought in the complaint was a declaratory judgment that the now repealed Fla. Stat. § 192.06 (4) is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed." *Id.*, at 414–415.

We see no reason to treat a challenge to the validity of a statute that has expired any differently from a challenge to the validity of a statute that has been repealed, and accordingly hold that any issues concerning whether H. R. 4042 became a law were mooted when that bill expired by its own terms. The failure of the bill to have any present effect does not depend on any decision as to whether the President's action was

a "pocket veto"; the bill by its own terms became a dead letter on September 30, 1984, regardless of whether it had previously been enacted into law or not. See also *Hall* v. *Beals*, 396 U. S. 45, 48 (1969) *(per curiam)*.

Respondents contend that other issues in the case keep it from being moot. They first assert that there remains a live controversy over the failure of petitioner Burke to publish H. R. 4042 in the Statutes at Large as a duly enacted law, in accordance with the provisions of 1 U. S. C. §§ 106a and 112 (1982 ed., Supp. III). This inaction, respondents cryptically claim, caused the "nullification of their lawmaking processes." Brief for Respondents Speaker and Bipartisan Leadership Group 50. We fail to see how any interest in the "lawmaking process" that might be served by the publication of duly enacted statutes can survive the life of the statutes themselves.*

Respondents also claim that funds expended on military aid without the certification required by H. R. 4042 might at some future date be subject to recovery under the provisions of 31 U. S. C. §§ 1341, 1349–1351, 3521. These laws relate to the auditing and account settlement of Government expenditures by the Comptroller General. But we think that this argument likewise fails to show that there is a live controversy here. There is no indication of a presently existing dispute as to the accounting obligations, and if such a dispute were to arise it would not be between the parties to this case. "[S]uch speculative contingencies afford no basis for our passing on the substantive issues [respondents] would have us de-

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*We reject respondents' argument that the questions of mootness and standing are necessarily intertwined. We can assume, *arguendo*, that a House of Congress suffers a judicially cognizable injury when the votes it has cast to pass an otherwise live statute have been nullified by action on the part of the Executive Branch. But this injury in "the nullification of [Congress'] lawmaking processes," Brief for Respondents Speaker and Bipartisan Leadership Group 50, no longer exists when the claimed statute has ceased to be effective by its own terms.

cide with respect to the" now-expired provisions of H. R. 4042. *Hall* v. *Beals*, *supra*, at 49–50.

The judgment of the Court of Appeals is therefore vacated, and the case is remanded to that court with instructions to remand the case to the District Court with instructions to dismiss the complaint. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950).

It is so ordered.

JUSTICE SCALIA took no part in the consideration or decision of this case.

JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

In my opinion this case is not moot. The United States Senate and the Bipartisan Leadership Group of the House of Representatives retain the same sort of interest in obtaining a ruling on the merits as they did prior to September 30, 1984. Prior to that date H. R. 4042, 98th Cong., 1st Sess. (1983), was either a "dead letter" because it had been killed by a valid pocket veto, or it was a valid law because the President's attempt to veto it was ineffective. If H. R. 4042 was a valid law, petitioners had a duty to publish it in the Statutes at Large of the United States; the Executive had a duty to discontinue military aid to El Salvador during the period between January 16, 1983, and September 30, 1984, unless the President could certify that El Salvador was progressing in protecting human rights; the Secretary of State had a duty to report to Congress the amount of any military aid that had been provided during that period in violation of the terms of H. R. 4042; and the Comptroller General had, and according to respondents may still have,* a duty to recover any amounts that were unlawfully allocated.

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*Respondents argue that a court decision that the pocket veto was invalid might still result in the return of some funds from the official or officials who made disbursements without legal authority. See Brief for

There is, of course, a serious question whether the Senate of the United States and a group of 33 Congressmen have standing to enforce those duties in this litigation. But if we assume—as the Court does, *ante*, at 364, n., and as we should for purposes of analyzing the mootness issue—that the Legislature's interest in protecting its work product from nullification by the Executive would have been sufficient to support standing prior to September 30, 1984, that interest is also sufficient to support standing today. As long as the question whether H. R. 4042 ever became a law continues to have practical significance, Congress retains its interest in ensuring that its enactments are given their proper legal effect.

The congressional interest in finding out whether the Executive has acted illegally in distributing funds to foreign sovereigns surely survives the period during which the prohibition on expenditures was in effect. Arguably that interest should be pursued in congressional committee investigations rather than litigation. But if we assume that the federal courthouse was a proper forum for resolution of the issues tendered by this complaint prior to September 30, 1984, it remains so today. Whatever else may be said about this case, it is not moot.

Respondents Barnes and United States Senate 33–36 (discussing 31 U. S. C. § 1341(a)(1); 31 U. S. C. §§ 3523–3525).

COLORADO *v.* BERTINE

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 85–889. Argued November 10, 1986—Decided January 14, 1987

A Boulder, Colorado, police officer arrested respondent for driving his van while under the influence of alcohol. After respondent was taken into custody and before a tow truck arrived to take the van to an impoundment lot, another officer, acting in accordance with local police procedures, inventoried the van's contents, opening a closed backpack in which he found various containers holding controlled substances, cocaine paraphernalia, and a large amount of cash. Prior to his trial on charges including drug offenses, the state trial court granted respondent's motion to suppress the evidence found during the inventory search. Although the court determined that the search did not violate respondent's rights under the Fourth Amendment of the Federal Constitution, it held that the search violated the Colorado Constitution. The Colorado Supreme Court affirmed, but premised its ruling on the Federal Constitution.

Held: The Fourth Amendment does not prohibit the State from proving the criminal charges with the evidence discovered during the inventory search of respondent's van. This case is controlled by the principles governing inventory searches of automobiles and of an arrestee's personal effects, as set forth in *South Dakota* v. *Opperman*, 428 U. S. 364, and *Illinois* v. *Lafayette*, 462 U. S. 640, rather than those governing searches of closed trunks and suitcases conducted solely for the purpose of investigating criminal conduct. *United States* v. *Chadwick*, 433 U. S. 1, and *Arkansas* v. *Sanders*, 442 U. S. 753, distinguished. The policies behind the warrant requirement, and the related concept of probable cause, are not implicated in an inventory search, which serves the strong governmental interests in protecting an owner's property while it is in police custody, insuring against claims of lost, stolen, or vandalized property, and guarding the police from danger. There was no showing here that the police, who were following standardized caretaking procedures, acted in bad faith or for the sole purpose of investigation. Police, before inventorying a container, are not required to weigh the strength of the individual's privacy interest in the container against the possibility that the container might serve as a repository for dangerous or valuable items. There is no merit to the contention that the search of respondent's van was unconstitutional because departmental regulations gave the police discretion to choose between impounding the van and parking

and locking it in a public parking place. The exercise of police discretion is not prohibited so long as that discretion is exercised—as was done here—according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Pp. 371–376.

706 P. 2d 411, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, STEVENS, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which POWELL and O'CONNOR, JJ., joined, *post*, p. 376. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 377.

John M. Haried argued the cause for petitioner. With him on the briefs were *C. Phillip Miller* and *Richard F. Good.*

Richard J. Lazarus argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried, Assistant Attorney General Trott,* and *Deputy Solicitor General Bryson.*

Cary C. Lacklen argued the cause for respondent. With him on the brief were *David F. Vela* and *Thomas M. Van Cleave III.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

On February 10, 1984, a police officer in Boulder, Colorado, arrested respondent Steven Lee Bertine for driving while under the influence of alcohol. After Bertine was taken into custody and before the arrival of a tow truck to take Bertine's van to an impoundment lot,[1] a backup officer

*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Larry W. Yackle* and *George Kannar;* and for the Colorado Criminal Defense Bar, Inc., et al. by *John M. Richilano* and *Mary G. Allen.*

[1] Section 7–7–2(a)(4) of the Boulder Revised Code authorizes police officers to impound vehicles when drivers are taken into custody. Section 7–7–2(a)(4) provides:

"A peace officer is authorized to remove or cause to be removed a vehicle from any street, parking lot, or driveway when:

. . . . . .

inventoried the contents of the van. The officer opened a closed backpack in which he found controlled substances, cocaine paraphernalia, and a large amount of cash. Bertine was subsequently charged with driving while under the influence of alcohol, unlawful possession of cocaine with intent to dispense, sell, and distribute, and unlawful possession of methaqualone. We are asked to decide whether the Fourth Amendment prohibits the State from proving these charges with the evidence discovered during the inventory of Bertine's van. We hold that it does not.

The backup officer inventoried the van in accordance with local police procedures, which require a detailed inspection and inventory of impounded vehicles. He found the backpack directly behind the frontseat of the van. Inside the pack, the officer observed a nylon bag containing metal canisters. Opening the canisters, the officer discovered that they contained cocaine, methaqualone tablets, cocaine paraphernalia, and $700 in cash. In an outside zippered pouch of the backpack, he also found $210 in cash in a sealed envelope. After completing the inventory of the van, the officer had the van towed to an impound lot and brought the backpack, money, and contraband to the police station.

After Bertine was charged with the offenses described above, he moved to suppress the evidence found during the inventory search on the ground, *inter alia*, that the search of the closed backpack and containers exceeded the permissible scope of such a search under the Fourth Amendment. The Colorado trial court ruled that probable cause supported Bertine's arrest and that the police officers had made the decisions to impound the vehicle and to conduct a thorough inventory search in good faith. Although noting that the inventory of the vehicle was performed in a "somewhat slipshod" manner, the District Court concluded that "the search of the backpack was done for the purpose of protecting the

(4) The driver of a vehicle is taken into custody by the police department." Boulder Rev. Code § 7–7–2(a)(4)(1981).

owner's property, protection of the police from subsequent claims of loss or stolen property, and the protection of the police from dangerous instrumentalities." App. 81–83. The court observed that the standard procedures for impounding vehicles mandated a "detailed inventory involving the opening of containers and the listing of [their] contents." *Id.*, at 81. Based on these findings, the court determined that the inventory search did not violate Bertine's rights under the Fourth Amendment of the United States Constitution. *Id.*, at 83. The court, nevertheless, granted Bertine's motion to suppress, holding that the inventory search violated the Colorado Constitution.

On the State's interlocutory appeal, the Supreme Court of Colorado affirmed. 706 P. 2d 411 (1985). In contrast to the District Court, however, the Colorado Supreme Court premised its ruling on the United States Constitution. The court recognized that in *South Dakota* v. *Opperman*, 428 U. S. 364 (1976), we had held inventory searches of automobiles to be consistent with the Fourth Amendment, and that in *Illinois* v. *Lafayette*, 462 U. S. 640 (1983), we had held that the inventory search of personal effects of an arrestee at a police station was also permissible under that Amendment. The Supreme Court of Colorado felt, however, that our decisions in *Arkansas* v. *Sanders*, 442 U. S. 753 (1979), and *United States* v. *Chadwick*, 433 U. S. 1 (1977), holding searches of closed trunks and suitcases to violate the Fourth Amendment, meant that *Opperman* and *Lafayette* did not govern this case.[2]

We granted certiorari to consider the important and recurring question of federal law decided by the Colorado Supreme

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[2] Two justices dissented from the majority opinion, arguing that *South Dakota* v. *Opperman* and *Illinois* v. *Lafayette* compel the conclusion that the inventory search of the backpack found in Bertine's van was permissible under the Fourth Amendment.

Court.[3] 475 U. S. 1081 (1986). As that court recognized, inventory searches are now a well-defined exception to the warrant requirement of the Fourth Amendment. See *Lafayette*, *supra*, at 643; *Opperman*, *supra*, at 367–376. The policies behind the warrant requirement are not implicated in an inventory search, *Opperman*, 428 U. S., at 370, n. 5, nor is the related concept of probable cause:

> "The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures. . . . The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations." *Ibid.*

See also *United States* v. *Chadwick*, *supra*, at 10, n. 5. For these reasons, the Colorado Supreme Court's reliance on *Arkansas* v. *Sanders*, *supra*, and *United States* v. *Chadwick*, *supra*, was incorrect. Both of these cases concerned searches solely for the purpose of investigating criminal conduct, with the validity of the searches therefore dependent on the application of the probable-cause and warrant requirements of the Fourth Amendment.

By contrast, an inventory search may be "reasonable" under the Fourth Amendment even though it is not conducted pursuant to a warrant based upon probable cause. In

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[3] Since our decision in *South Dakota* v. *Opperman*, several courts have confronted the issue whether police may inventory the contents of containers found in vehicles taken into police custody. See, *e. g.*, *United States* v. *Griffin*, 729 F. 2d 475 (CA7) (upholding inventory search of package found in paper bag), cert. denied, 469 U. S. 830 (1984); *United States* v. *Bloomfield*, 594 F. 2d 1200 (CA8 1979) (affirming suppression of evidence found in closed knapsack); *People* v. *Braasch*, 122 Ill. App. 3d 747, 461 N. E. 2d 651 (1984) (upholding inventory of paper bag); *People* v. *Gonzalez*, 62 N. Y. 2d 386, 465 N. E. 2d 823 (1984) (upholding inventory of paper bag); *Boggs* v. *Commonwealth*, 229 Va. 501, 331 S. E. 2d 407 (1985) (upholding inventory of boxes and pouch found in bag), cert. denied, 475 U. S. 1031 (1986).

Opperman, this Court assessed the reasonableness of an inventory search of the glove compartment in an abandoned automobile impounded by the police. We found that inventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger. In light of these strong governmental interests and the diminished expectation of privacy in an automobile, we upheld the search. In reaching this decision, we observed that our cases accorded deference to police caretaking procedures designed to secure and protect vehicles and their contents within police custody. See *Cooper* v. *California*, 386 U. S. 58, 61–62 (1967); *Harris* v. *United States*, 390 U. S. 234, 236 (1968); *Cady* v. *Dombrowski*, 413 U. S. 433, 447–448 (1973).[4]

In our more recent decision, *Lafayette*, a police officer conducted an inventory search of the contents of a shoulder bag in the possession of an individual being taken into custody. In deciding whether this search was reasonable, we recognized that the search served legitimate governmental interests similar to those identified in *Opperman*. We determined that those interests outweighed the individual's Fourth Amendment interests and upheld the search.

In the present case, as in *Opperman* and *Lafayette*, there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation. In addition, the governmental interests justifying the inventory searches in *Opperman* and *Lafayette* are

[4]The Colorado Supreme Court correctly stated that *Opperman* did not address the question whether the scope of an inventory search may extend to closed containers located in the interior of an impounded vehicle. We did note, however, that "'when the police take custody of any sort of container [such as] an automobile . . . it is reasonable to search the container to itemize the property to be held by the police.'" 428 U. S., at 371 (quoting *United States* v. *Gravitt*, 484 F. 2d 375, 378 (CA5 1973), cert. denied, 414 U. S. 1135 (1974)).

nearly the same as those which obtain here. In each case, the police were potentially responsible for the property taken into their custody. By securing the property, the police protected the property from unauthorized interference. Knowledge of the precise nature of the property helped guard against claims of theft, vandalism, or negligence. Such knowledge also helped to avert any danger to police or others that may have been posed by the property.[5]

The Supreme Court of Colorado opined that *Lafayette* was not controlling here because there was no danger of introducing contraband or weapons into a jail facility. Our opinion in *Lafayette*, however, did not suggest that the station-house setting of the inventory search was critical to our holding in that case. Both in the present case and in *Lafayette*, the common governmental interests described above were served by the inventory searches.

The Supreme Court of Colorado also expressed the view that the search in this case was unreasonable because Bertine's van was towed to a secure, lighted facility and because Bertine himself could have been offered the opportunity to make other arrangements for the safekeeping of his property. But the security of the storage facility does not completely eliminate the need for inventorying; the police may still wish to protect themselves or the owners of the lot against false claims of theft or dangerous instrumentalities. And while giving Bertine an opportunity to make alterna-

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[5] In arguing that the latter two interests are not implicated here, the dissent overlooks the testimony of the backup officer who conducted the inventory of Bertine's van. According to the officer, the vehicle inventory procedures of the Boulder Police Department are designed for the "[p]rotection of the police department" in the event that an individual later claims that "there was something of value taken from within the vehicle." 2 Tr. 19. The officer added that inventories are also conducted in order to check "[f]or any dangerous items such as explosives [or] weapons." *Id.*, at 20. The officer testified that he had found such items in vehicles.

tive arrangements would undoubtedly have been possible, we said in *Lafayette:*

> "[T]he real question is not what 'could have been achieved,' but whether the Fourth Amendment *requires* such steps . . . .
>
> "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Lafayette*, 462 U. S., at 647 (emphasis in original).

See *Cady* v. *Dombrowski*, *supra*, at 447; *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 557, n. 12 (1976). We conclude that here, as in *Lafayette*, reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.[6]

The Supreme Court of Colorado also thought it necessary to require that police, before inventorying a container, weigh the strength of the individual's privacy interest in the container against the possibility that the container might serve as a repository for dangerous or valuable items. We think that such a requirement is contrary to our decisions in

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[6] We emphasize that, in this case, the trial court found that the Police Department's procedures mandated the opening of closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria. See *Lafayette*, 462 U. S., at 648; *Opperman*, 428 U. S., at 374–375.

By quoting a portion of the Colorado Supreme Court's decision out of context, the dissent suggests that the inventory here was not authorized by the standard procedures of the Boulder Police Department. See *post*, at 380–381. Yet that court specifically stated that the procedure followed here was "officially authorized." 706 P. 2d 411, 413, n. 2 (1985). In addition, the court did not disturb the trial court's finding that the police procedures for impounding vehicles required a detailed inventory of Bertine's van. See *id.*, at 418–419.

Opperman and *Lafayette*, and by analogy to our decision in *United States* v. *Ross*, 456 U. S. 798 (1982):

> "Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit." *Lafayette*, *supra*, at 648.
>
> "When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *United States* v. *Ross*, *supra*, at 821.

We reaffirm these principles here: "'[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *Lafayette*, *supra*, at 648 (quoting *New York* v. *Belton*, 453 U. S. 454, 458 (1981)).

Bertine finally argues that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place. The Supreme Court of Colorado did not rely on this argument in reaching its conclusion, and we reject it. Nothing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of

standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it.[7] There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity.

While both *Opperman* and *Lafayette* are distinguishable from the present case on their facts, we think that the principles enunciated in those cases govern the present one. The judgment of the Supreme Court of Colorado is therefore

Reversed.

JUSTICE BLACKMUN, with whom JUSTICE POWELL and JUSTICE O'CONNOR join, concurring.

The Court today holds that police officers may open closed containers while conducting a routine inventory search of an impounded vehicle. I join the Court's opinion, but write separately to underscore the importance of having such inventories conducted only pursuant to standardized police procedures. The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. See *South Dakota* v. *Opperman*, 428 U. S. 364, 382–383 (1976) (POWELL, J., concurring). This absence of discretion ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of crime. Thus, it is permis-

[7] In arguing that the Boulder Police Department procedures set forth no standardized criteria guiding an officer's decision to impound a vehicle, the dissent selectively quotes from the police directive concerning the care and security of vehicles taken into police custody. The dissent fails to mention that the directive establishes several conditions that must be met before an officer may pursue the park-and-lock alternative. For example, police may not park and lock the vehicle where there is reasonable risk of damage or vandalism to the vehicle or where the approval of the arrestee cannot be obtained. App. 91–92, 94–95. Not only do such conditions circumscribe the discretion of individual officers, but they also protect the vehicle and its contents and minimize claims of property loss.

sible for police officers to open closed containers in an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle. As the Court emphasizes, the trial court in this case found that the Police Department's standard procedures did mandate the opening of closed containers and the listing of their contents. See *ante*, at 374, n. 6.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Recognizing that "both *Opperman* and *Lafayette* are distinguishable from the present case on their facts," *ante*, at 376, the majority applies the balancing test enunciated in those cases to uphold as reasonable the inventory of a closed container in a car impounded when its driver was placed under arrest. However, the distinctive facts of this case require a different result. This search—it cannot legitimately be labeled an inventory—was unreasonable and violated the Fourth Amendment. Unlike the inventories in *South Dakota* v. *Opperman*, 428 U. S. 364 (1976), and *Illinois* v. *Lafayette*, 462 U. S. 640 (1983), it was not conducted according to standardized procedures. Furthermore, the governmental interests justifying the intrusion are significantly weaker than the interests identified in either *Opperman* or *Lafayette* and the expectation of privacy is considerably stronger.

I

As the Court acknowledges, *ante*, at 374, and n. 6, and 375–376, inventory searches are reasonable only if conducted according to standardized procedures. In both *Opperman* and *Lafayette*, the Court relied on the absence of police discretion in determining that the inventory searches in question were reasonable. Chief Justice Burger's opinion in *Opperman* repeatedly referred to this standardized nature of inventory procedures. See 428 U. S., at 369, 372, 376. JUSTICE POWELL's concurring opinion in that case also

stressed that "no significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope." *Id.*, at 384 (footnote omitted). Similarly, the Court in *Lafayette* emphasized the standardized procedure under which the station-house inventory was conducted. See 462 U. S., at 646, 647, 648; see also *id.*, at 649 (MARSHALL, J., concurring in judgment). In assessing the reasonableness of searches conducted in limited situations such as these, where we do not require probable cause or a warrant, we have consistently emphasized the need for such set procedures: "standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Delaware* v. *Prouse*, 440 U. S. 648, 661 (1979). See *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 270 (1973); *Cady* v. *Dombrowski*, 413 U. S. 433, 443 (1973); *Harris* v. *United States*, 390 U. S. 234, 235 (1968); *Camara* v. *Municipal Court*, 387 U. S. 523, 532–533 (1967).

The Court today attempts to evade these clear prohibitions on unfettered police discretion by declaring that "the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it." *Ante*, at 375–376. This vital assertion is flatly contradicted by the record in this case. The officer who conducted the inventory, Officer Reichenbach, testified at the suppression hearing that the decision not to "park and lock" respondent's vehicle was his "own individual discretionary decision." Tr. 76. Indeed, application of these supposedly standardized "criteria" upon which the Court so heavily relies would have yielded a different result in this case. Since there was ample public parking adjacent to the intersection where respondent was stopped, consideration of "feasibility" would certainly have militated in favor of the "park and lock"

option, not against it. I do not comprehend how consideration of "appropriateness" serves to channel a field officer's discretion; nonetheless, the "park and lock" option would seem particularly appropriate in this case, where respondent was stopped for a traffic offense and was not likely to be in custody for a significant length of time.

Indeed, the record indicates that *no* standardized criteria limit a Boulder police officer's discretion. According to a departmental directive,[1] after placing a driver under arrest, an officer has three options for disposing of the vehicle. First, he can allow a third party to take custody.[2] Second, the officer or the driver (depending on the nature of the arrest) may take the car to the nearest public parking facility, lock it, and take the keys.[3] Finally, the officer can do what was done in

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[1] Subsections 7–7–2(a)(1) and 7–7–2(a)(4) of the Boulder Revised Code authorize police to impound a vehicle if the driver is taken into custody or if the vehicle obstructs traffic. A departmental directive authorizes inventory searches of impounded vehicles. See General Procedure issued from the office of the Chief of Police, Boulder Police Department, concerning Motor Vehicle Impounds, effective September 7, 1977, reproduced in App. 89–95.

[2] See *id.*, at 95.

[3] If the vehicle and its contents are not evidence of a crime and the owner consents, § III of the General Procedure provides, in relevant part:

"A. Upon placing the operator of a motor vehicle in custody, Officers *may* take the following steps in securing the arrestee's vehicle and property . . . :

. . . . . .

"4. The Officer shall drive the vehicle off the roadway and legally park the vehicle in the nearest PUBLIC parking area. The date, time, and location where the vehicle is parked shall be indicated on the IMPOUND FORM.

"5. The Officer shall remove the ignition keys, and lock all doors of the vehicle.

"6. During the booking process, the arrestee shall be given a continuation form for his signature which indicates the location of his vehicle. One copy of the continuation form is to be retained in the case file." *Id.*, at 93–94 (emphasis added).

this case: impound the vehicle, and search and inventory its contents, including closed containers.[4]

Under the first option, the police have no occasion to search the automobile. Under the "park and lock" option, "[c]losed containers that give no indication of containing either valuables or a weapon *may not be opened and the contents searched* (i. e., inventoried)." App. 92–93 (emphasis added). Only if the police choose the third option are they entitled to search closed containers in the vehicle. Where the vehicle is not itself evidence of a crime,[5] as in this case, the police apparently have totally unbridled discretion as to which procedure to use. See 706 P. 2d 411, 413, n. 3 (Colo. 1985) ("[T]he Boulder Police Department's regulations and rules do not require that an automobile be inventoried and searched in accordance with the procedures followed in this

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[4] Section II(A) of the General Procedure establishes the following impoundment procedures:

"1. If the vehicle or its contents have been used in the commission of a crime or are themselves the fruit of a crime, the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM.

"2. Personal items of value should be removed from the vehicle and subsequently placed into Property for safekeeping.

"3. The Officer shall request a Tow Truck, and upon its arrival have the Tow Truck operator sign the IMPOUND FORM, keeping one copy in his possession, before the Officer releases the vehicle for impoundment in the City of Boulder impoundment facility." *Id.*, at 90–91.

Subsection (B) of the directive provides that this procedure is also to be followed when a vehicle involved in a traffic accident is to be held for evidentiary purposes.

[5] Respondent's van was not evidence of a crime within the meaning of the departmental directive; Officer Reichenbach testified that it was not his practice to impound all cars following an arrest for driving while under the influence of alcohol. Tr. 61. The Memorandum also requires the "approval of the arrestee" before the police can "park and lock" his car, App. 92. In this case, however, respondent was never advised of this option and had no opportunity to consent. At the suppression hearing, he indicated that he would have consented to such a procedure. See Tr. 110.

case"). Consistent with this conclusion, Officer Reichenbach testified that such decisions were left to the discretion of the officer on the scene. App. 60.

Once a Boulder police officer has made this initial completely discretionary decision to impound a vehicle, he is given little guidance as to which areas to search and what sort of items to inventory. The arresting officer, Officer Toporek, testified at the suppression hearing as to what items would be inventoried: "That would I think be very individualistic as far as what an officer may or may not go into. I think whatever arouses his suspicious *[sic]* as far as what may be contained in any type of article in the car." *Id.*, at 78. In application, these so-called procedures left the breadth of the "inventory" to the whim of the individual officer. Clearly, "[t]he practical effect of this system is to leave the [owner] subject to the discretion of the official in the field." *Camara* v. *Municipal Court*, 387 U. S., at 532.

Inventory searches are not subject to the warrant requirement because they are conducted by the government as part of a "community caretaking" function, "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady* v. *Dombrowski*, 413 U. S., at 441. Standardized procedures are necessary to ensure that this narrow exception is not improperly used to justify, after the fact, a warrantless investigative foray. Accordingly, to invalidate a search that is conducted without established procedures, it is not necessary to establish that the police actually acted in bad faith, or that the inventory was in fact a "pretext." By allowing the police unfettered discretion, Boulder's discretionary scheme, like the random spot checks in *Delaware* v. *Prouse*, is unreasonable because of the "'grave danger' of abuse of discretion." 440 U. S., at 662.

II

In *South Dakota* v. *Opperman*, 428 U. S. 364 (1976), and *Illinois* v. *Lafayette*, 462 U. S. 640 (1983), both of which

involved inventories conducted pursuant to standardized procedures, we balanced the individual's expectation of privacy against the government's interests to determine whether the search was reasonable. Even if the search in this case did constitute a legitimate inventory, it would nonetheless be unreasonable under this analysis.

A

The Court greatly overstates the justifications for the inventory exception to the Fourth Amendment. Chief Justice Burger, writing for the majority in *Opperman*, relied on three governmental interests to justify the inventory search of an unlocked glove compartment in an automobile impounded for overtime parking: (i) "the protection of the owner's property while it remains in police custody"; (ii) "the protection of the police against claims or disputes over lost or stolen property"; and (iii) "the protection of the police from potential danger." 428 U. S., at 369. The majority finds that "nearly the same" interests obtain in this case. See *ante*, at 373. As JUSTICE POWELL's concurring opinion in *Opperman* reveals, however, only the first of these interests is actually served by an automobile inventory search.

The protection-against-claims interest did not justify the inventory search either in *Opperman*, see 428 U. S., at 378, n. 3 (POWELL, J., concurring), or in this case. As the majority apparently concedes, *ante*, at 373, the use of secure impoundment facilities effectively eliminates this concern.[6] As

[6]The impoundment lot in *South Dakota* v. *Opperman* was "the old county highway yard. It ha[d] a wooden fence partially around part of it, and kind of a dilapidated wire fence, a makeshift fence." 428 U. S., at 366, n. 1. See also *Cady* v. *Dombrowski*, 413 U. S. 433, 443 (1973) ("[T]he car was left outside, in a lot seven miles from the police station to which respondent had been taken, and no guard was posted over it"). By contrast, in the present case, respondent's vehicle was taken to a lighted, private storage lot with a locked 6-foot fence. The lot was patrolled by private security officers and police, and nothing had ever been stolen from a vehicle in the lot. App. 69–71.

to false claims, "inventories are [not] a completely effective means of discouraging false claims, since there remains the possibility of accompanying such claims with an assertion that an item was stolen prior to the inventory or was intentionally omitted from the police records." 428 U. S., at 378–379 (POWELL, J., concurring). See also *id.*, at 391, and nn. 9 and 10 (MARSHALL, J., dissenting); 2 W. LaFave, Search and Seizure § 5.5, p. 360, n. 50 (1978 and Supp. 1986).

Officer Reichenbach's inventory in this case would not have protected the police against claims lodged by respondent, false or otherwise. Indeed, the trial court's characterization of the inventory as "slip-shod" is the height of understatement. For example, Officer Reichenbach failed to list $150 in cash found in respondent's wallet or the contents of a sealed envelope marked "rent," $210, in the relevant section of the property form. Tr. 40–41; App. 41–42. His reports make no reference to other items of value, including respondent's credit cards, and a converter, a hydraulic jack, and a set of tire chains, worth a total of $125. Tr. 41, 62–63. The $700 in cash found in respondent's backpack, along with the contraband, appeared only on a property form completed later by someone other than Officer Reichenbach. *Id.*, at 81–82. The interior of the vehicle was left in disarray, *id.*, at 99, and the officer "inadvertently" retained respondent's keys—including his house keys—for two days following his arrest. *Id.*, at 116, 133–134.

The third interest—protecting the police from potential danger—failed to receive the endorsement of a majority of the Court in *Opperman*. After noting that "there is little danger associated with impounding unsearched vehicles," JUSTICE POWELL recognized that "there does not appear to be any effective way of identifying in advance those circumstances or classes of automobile impoundments which represent a greater risk." 428 U. S., at 378. See also *id.*, at 390 (MARSHALL, J., dissenting) (safety rationale "cannot justify the search of every car upon the basis of undifferentiated pos-

sibility of harm"). As with the charge of overtime parking in *Opperman*, there is nothing in the nature of the offense for which respondent was arrested that suggests he was likely to be carrying weapons, explosives, or other dangerous items. Cf. *Cady* v. *Dombrowski*, 413 U. S., at 436–437 (police reasonably believed that the defendant's service revolver was in the car). Not only is protecting the police from dangerous instrumentalities an attenuated justification for most automobile inventory searches, but opening closed containers to inventory the contents can only increase the risk. In the words of the District Court in *United States* v. *Cooper*, 428 F. Supp. 652, 654–655 (SD Ohio 1977): "The argument that the search was necessary to avoid a possible booby-trap is . . . easily refuted. No sane individual inspects for booby-traps by simply opening the container."

Thus, only the government's interest in protecting the owner's property actually justifies an inventory search of an impounded vehicle. See 428 U. S., at 379 (POWELL, J., concurring); *id.*, at 391 (MARSHALL, J., dissenting). While I continue to believe that preservation of property does not outweigh the privacy and security interests protected by the Fourth Amendment, I fail to see how preservation can even be asserted as a justification for the search in this case. In *Opperman*, the owner of the impounded car was not available to safeguard his possessions, see *id.*, at 375, and it could plausibly be argued that, in his absence, the police were entitled to act for his presumed benefit. See also *Cady* v. *Dombrowski*, *supra*, at 436 (comatose defendant). When the police conducted the inventory in *Opperman*, they could not predict how long the car would be left in their possession. See 428 U. S., at 379 (POWELL, J., concurring) ("[M]any owners might leave valuables in their automobiles temporarily that they would not leave there unattended for the several days that police custody may last"); cf. *Cooper* v. *California*, 386 U. S. 58, 61 (1967) (police retained car for four months pending forfeiture; length of time considered by the Court in as-

sessing reasonableness of inventory). In this case, however, the owner was "present to make other arrangements for the safekeeping of his belongings," *Opperman*, 428 U. S., at 375, yet the police made no attempt to ascertain whether in fact he wanted them to "safeguard" his property. Furthermore, since respondent was charged with a traffic offense, he was unlikely to remain in custody for more than a few hours. He might well have been willing to leave his valuables unattended in the locked van for such a short period of time. See Tr. 110 (had he been given the choice, respondent indicated at the suppression hearing that he "would have parked [the van] in the lot across the street [and] [h]ad somebody come and get it").

Thus, the government's interests in this case are weaker than in *Opperman*, but the search here is much more intrusive. *Opperman* did not involve a search of closed containers or other items that "'touch upon intimate areas of an individual's personal affairs,'" 428 U. S., at 380, and n. 7 (POWELL, J., concurring) (quoting *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 78–79 (1974) (POWELL, J., concurring)); nor can the Court's opinion be read to authorize the inspection of "containers which might themselves be sealed, removed and secured without further intrusion." 428 U. S., at 388, n. 6 (MARSHALL, J., dissenting). To expand the *Opperman* rationale to include containers in which the owner clearly has a reasonable expectation of privacy, the Court relies on *Illinois* v. *Lafayette*, 462 U. S. 640 (1983). Such reliance is fundamentally misplaced, however; the inventory in *Lafayette* was justified by considerations which are totally absent in this context.

In *Lafayette*, we upheld a station-house inventory search of an arrestee's shoulder bag. Notwithstanding the Court's assertions to the contrary, *ante*, at 373, the inventory in that case *was* justified primarily by compelling governmental interests unique to the station house, preincarceration context. There is a powerful interest in preventing the introduction

of contraband or weapons into a jail.[7] "Arrested persons have also been known to injure themselves—or others—with belts, knives, drugs, or other items on their person while being detained. Dangerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent-looking articles taken from the arrestee's possession." 462 U. S., at 646. Removing such items from persons about to be incarcerated is necessary to reasonable jail security; once these items have been identified and removed, "inventorying them is an entirely reasonable administrative procedure." *Ibid.* Although *Lafayette* also involved the property justifications relied on in *Opperman*, I do not believe it can fairly be read to expand the scope of inventory searches where the pressing security concerns of the station house are absent.

B

Not only are the government's interests weaker here than in *Opperman* and *Lafayette*, but respondent's privacy interest is greater. In upholding the search in *Opperman*, the Court emphasized the fact that the defendant had a diminished expectation of privacy in his automobile, due to "pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements" and "the obviously public nature of automobile travel." 428 U. S., at 368. See also *id.*, at 379 (POWELL, J., concurring); but see *id.*, at 386–388 (MARSHALL, J., dissenting). Similarly, in *Lafayette*, the Court emphasized the

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[7] The importance of this justification to the outcome in *Illinois* v. *Lafayette* is amply demonstrated by the Court's direction on remand: "The record is unclear as to whether respondent was to have been incarcerated after being booked for disturbing the peace. That is an appropriate inquiry on remand." 462 U. S., at 648, n. 3. See also *id.*, at 649 (MARSHALL, J., concurring in judgment) ("I agree that the police do not need a warrant or probable cause to conduct an inventory search *prior to incarcerating a suspect*" (emphasis added)); see also *United States* v. *Robinson*, 414 U. S. 218, 258, n. 7 (1973) (MARSHALL, J., dissenting) (the justification for station-house searches is "the fact that the suspect will be placed in jail").

fact that the defendant was in custody at the time the inventory took place. 462 U. S., at 645–646.

Here the Court completely ignores respondent's expectation of privacy in his backpack. Whatever his expectation of privacy in his automobile generally, our prior decisions clearly establish that he retained a reasonable expectation of privacy in the backpack and its contents. See *Arkansas* v. *Sanders*, 442 U. S. 753, 762 (1979) ("[L]uggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy"); *United States* v. *Chadwick*, 433 U. S. 1, 13 (1977) ("[A] person's expectations of privacy in personal luggage are substantially greater than in an automobile"). Indeed, the Boulder police officer who conducted the inventory acknowledged that backpacks commonly serve as repositories for personal effects.[8] Thus, even if the governmental interests in this case were the same as those in *Opperman*, they would nonetheless be outweighed by respondent's comparatively greater expectation of privacy in his luggage.

III

In *Coolidge* v. *New Hampshire*, 403 U. S. 443, 461–462 (1971), a plurality of this Court stated: "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." By upholding the search in this case, the Court not only ignores that principle, but creates another talisman to overcome the requirements of the Fourth Amendment—the term "inventory." Accordingly, I dissent.

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[8] At the suppression hearing, Officer Reichenbach stated: "The average person on the street . . . carries items of personal value in the backpacks, wallets, checkbooks, text books." Tr. 23.

CLARKE, COMPTROLLER OF THE CURRENCY *v.* SECURITIES INDUSTRY ASSOCIATION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85–971. Argued November 3, 1986—Decided January 14, 1987*

Petitioner Security Pacific National Bank (Security Pacific) applied to the Comptroller of the Currency for permission to establish an affiliate named Discount Brokerage, and to offer discount brokerage services not only at its branch offices but also at other locations inside and outside of its home State. A pertinent branching provision of the National Bank Act, 12 U. S. C. § 81, originally enacted in 1927 as part of the McFadden Act, limits "the general business" of a national bank to its headquarters and any "branches" permitted by 12 U. S. C. § 36. Section 36(c) provides that a national bank is permitted to branch only in its home State and only to the extent that a bank of the same State is permitted to branch under state law, and the term "branch" is defined in § 36(f) "to include any branch bank, branch office, branch agency, additional office or any branch place of business . . . at which deposits are received, or checks paid, or money lent." The Comptroller approved Security Pacific's application, concluding that the nonchartered offices at which Discount Brokerage would offer its services would not constitute branches under the McFadden Act because none of the statutory branching functions set forth in § 36(f) would be performed there, and that treating offices conducting brokerage activities as branches under § 36(f) would be inconsistent with the longstanding practice of banks in operating nonbranch offices dealing in United States Government or municipal securities. Respondent, a trade association representing securities brokers, underwriters, and investment bankers, brought suit in Federal District Court, contending that bank discount brokerage offices are branches within the meaning of § 36(f) and thus are subject to the geographical restrictions imposed by § 36(c). The court, relying on *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, rejected the Comptroller's contention that respondent lacked standing to maintain the action, and ruled for respondent on the merits. The Court of Appeals affirmed.

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*Together with No. 85–972, *Security Pacific National Bank* v. *Securities Industry Association*, also on certiorari to the same court.

Held:

1. Respondent has standing to maintain this lawsuit. Under the "standing" standard set forth in *Association of Data Processing Service Organizations*, *supra*, at 153, the complainant must be injured in fact, and the interest sought to be protected by the complainant must be arguably within the "zone of interests" to be protected or regulated by the statute in question. The essential inquiry in determining standing is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge an agency's disregard of the law. Cf. *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 347. The "zone of interest" test provides standing in this case since the interest respondent asserts has a plausible relationship to the policies underlying §§ 36 and 81 with regard to Congress' concern to keep national banks from gaining a monopoly control over credit and money through unlimited branching. Pp. 394–403.

2. The Comptroller, whose construction of the statutory provisions is entitled to great weight, did not exceed his authority in approving Security Pacific's application. There is no merit to respondent's contention that the Comptroller's interpretation of the National Bank Act contradicts the plain language of the statute. The phrase "[t]he general business of each national banking association" in § 81 need not be read to encompass all the business in which a bank engages, but, as interpreted by the Comptroller, can plausibly be read as covering only those activities that are part of the bank's core banking functions. The Act's history, including that predating the branching provisions of the McFadden Act, supports the Comptroller's interpretation. The history of the McFadden Act itself does not establish that Congress intended the locational restriction of §§ 81 and 36 to reach all activities in which national banks are specifically authorized to engage. The Comptroller reasonably interprets § 36(f) as requiring "competitive equality" between state and national banks only in core banking functions, and the operation of a discount brokerage service is not such a function. Pp. 403–409.

244 U. S. App. D. C. 419, 758 F. 2d 739, and 247 U. S. App. D. C. 42, 765 F. 2d 1196, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined, and in Parts I and III of which REHNQUIST, C. J., and STEVENS and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 409. SCALIA, J., took no part in the consideration or decision of the cases.

Charles A. Rothfeld argued the cause for petitioner in No. 85–971. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Wallace, Anthony J. Steinmeyer, Nicholas S. Zeppos, Richard V. Fitzgerald,* and *Mark L. Leemon. William T. Coleman, Jr.*, argued the cause for petitioner in No. 85–972. With him on the briefs were *John H. Beisner* and *Edward J. McAniff.*

James B. Weidner argued the cause for respondent in both cases. With him on the brief were *David A. Schulz, William J. Fitzpatrick,* and *Donald J. Crawford.*†

JUSTICE WHITE delivered the opinion of the Court.

In these cases, we review an application of the so-called "zone of interest" standing test that was first articulated in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U. S. 150 (1970). Concluding that respondent is a proper litigant, we also review, and reverse, a judgment that the Comptroller of the Currency exceeded his authority in approving the applications of two national banks for the establishment or purchase of discount brokerage subsidiaries.

I

In 1982, two national banks, Union Planters National Bank of Memphis (Union Planters) and petitioner Security Pacific National Bank of Los Angeles (Security Pacific), applied to the Comptroller of the Currency for permission to open offices that would offer discount brokerage services to the pub-

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†Briefs of *amici curiae* urging reversal were filed for the American Bankers Association by *John J. Gill III* and *Michael F. Crotty;* for the Consumer Bankers Association by *Craig Ulrich;* and for the New York Clearing House Association by *Robert S. Rifkind.*

Briefs of *amici curiae* urging affirmance were filed for Branch Banking and Trust Co. et al. by *John R. Jordan, Jr., Henry W. Jones, Jr.,* and *Eugene Gressman;* and for Independent Bankers Association of America by *Erwin N. Griswold, Leonard J. Rubin,* and *Mollie A. Murphy.*

lic.[1] Union Planters proposed to acquire an existing discount brokerage operation, and Security Pacific sought to establish an affiliate named Discount Brokerage. Both banks proposed to offer discount brokerage services not only at their branch offices but also at other locations inside and outside of their home States.

In passing on Security Pacific's application, the Comptroller was faced with the question whether the operation of Discount Brokerage would violate the National Bank Act's branching provisions. Those limitations, enacted as §§ 7 and 8 of the McFadden Act, 44 Stat. 1228, as amended, are codified at 12 U. S. C. § 36 and 12 U. S. C. § 81. Section 81 limits "the general business" of a national bank to its headquarters and any "branches" permitted by § 36. Section 36(c) provides that a national bank is permitted to branch only in its home State and only to the extent that a bank of the same State is permitted to branch under state law. The term "branch" is defined at 12 U. S. C. § 36(f) "to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."

The Comptroller concluded that "the non-chartered offices at which Discount Brokerage will offer its services will not constitute branches under the McFadden Act because none of the statutory branching functions will be performed there." App. D to Pet. for Cert. in No. 85–971, p. 39a. He explained that although Discount Brokerage would serve as an intermediary for margin lending, loan approval would take place at chartered Security Pacific offices, so that Discount Brokerage offices would not be lending money within the meaning of § 36(f). Likewise, although Discount Broker-

[1] Discount brokers execute trades on behalf of their customers but do not offer investment advice. As a result, the commissions they charge are substantially lower than those charged by full-service brokers. See *Securities Industries Assn.* v. *Board of Governors, FRS*, 468 U. S. 207, 209, n. 2 (1984).

age would maintain, and pay interest on, customer balances created as an incident of its brokerage business, the Comptroller concluded that these accounts differ sufficiently in nature from ordinary bank accounts that Discount Brokerage would not be engaged in receiving deposits.[2] He further observed that treating offices conducting brokerage activities as branches under § 36(f) would be inconsistent with the "long-standing and widespread" practice of banks' operating nonbranch offices dealing in United States Government or municipal securities. *Id.*, at 44a. Accordingly, the Comptroller approved Security Pacific's application.[3]

Respondent, a trade association representing securities brokers, underwriters, and investment bankers, brought this action in the United States District Court for the District of Columbia. Among other things, respondent contended that bank discount brokerage offices are branches within the meaning of § 36(f) and thus are subject to the geographical

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[2] The Comptroller relied primarily on the fact that banks publicly solicit deposits and use deposited funds in lending, while credit balances maintained by brokers are not, as such, directly solicited from the public, and are subject to regulatory restrictions regarding use by brokers. See the Securities Investor Protection Act, 15 U. S. C. § 78aaa *et seq.* (restricting advertising, promotional, and selling practices of brokers regarding interest-bearing free credit balances); 17 CFR § 240.15c3–2 (1986) (regulating the use of credit balances by brokers).

Although the Comptroller believed that § 36(f) should be read narrowly to define "branch" only with reference to receiving deposits, making loans, and cashing checks, he recognized that there is authority supporting a broader reading. In *St. Louis County National Bank* v. *Mercantile Trust Company National Assn.*, 548 F. 2d 716 (CA8 1976), cert. denied, 433 U. S. 909 (1977), a trust office operated by a national bank was held to be a branch. While disagreeing with this holding, the Comptroller took the position that it "should at the very least be limited to those dealings with the public requiring a specialized banking or similar license." App. D to Pet. for Cert. in No. 85–971, pp. 43a–44a.

[3] A month later, the Comptroller approved without comment the application of Union Planters to acquire an existing brokerage firm. App. E to Pet. for Cert. in No. 85–971, p. 47a.

restrictions imposed by § 36(c).[4] The Comptroller disputed this position on the merits and also argued that respondent lacks standing because it is not within the zone of interests protected by the McFadden Act.[5] The Comptroller contended that Congress passed the McFadden Act not to protect securities dealers but to establish competitive equality between state and national banks.

The District Court, relying on *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970), held that respondent has standing and rejected the Comptroller's submission that national banks may offer discount brokerage services at nonbranch locations. A divided panel of the Court of Appeals affirmed in a brief *per curiam* opinion,[6] 244 U. S. App. D. C. 419, 758 F. 2d 739 (1985), and rehearing en banc was denied, with three judges dissenting. 247 U. S. App. D. C. 42, 765 F. 2d 1196 (1985).

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[4] Respondent also contended that national banks are entirely prohibited from offering discount brokerage services by the Glass-Steagall Act, 12 U. S. C. § 24 (1982 ed. and Supp. III); 12 U. S. C. §§ 78, 377, 378. This contention was rejected by the District Court, a holding that is not before us.

[5] The Comptroller also argued unsuccessfully that respondent could show no injury, and thus had not presented the court with a "case or controversy" within the meaning of Article III. The Comptroller has since abandoned this argument.

[6] The dissenting judge argued that there was no standing, as he did in dissenting, with two other judges, from the denial of en banc rehearing. In his view, the purpose of the McFadden Act is to establish competitive equality between national and state banks as regards branching, and while "state banks (and state banking commissions) are obviously within the zone of interests protected by the statute, . . . the brokerage houses suing in the present case are no more within it than are businesses competing for the parking spaces that an unlawful branch may occupy." 247 U. S. App. D. C., at 43, 765 F. 2d, at 1197. The dissenter also argued that the indefinite language of § 36(f) "presents precisely the situation in which our deference to the agency should be at its height" *id.*, at 44, 765 F. 2d, at 1198, and concluded that the Comptroller's construction of the statute "cannot by any means be considered unreasonable" and therefore should be affirmed if respondent is held to have standing. *Ibid.*

The Comptroller sought review by petition for certiorari, as did Security Pacific. We granted both petitions, and consolidated the cases. 475 U. S. 1044 (1986). We now affirm the judgment that respondent has standing, but reverse on the merits.

II

In *Association of Data Processing Service Organizations, Inc.* v. *Camp*, *supra*, the association challenged a ruling by the Comptroller allowing national banks, as part of their incidental powers under 12 U. S. C. § 24 Seventh, to make data-processing services available to other banks and to bank customers. There was no serious question that the data processors had sustained an injury in fact by virtue of the Comptroller's action. Rather, the question, which the Court described as one of standing, was whether the data processors should be heard to complain of that injury. The matter was basically one of interpreting congressional intent,[7] and the Court looked to § 10 of the Administrative Procedure Act (APA), 5 U. S. C. § 702, which "grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute.'" 397 U. S., at 153. The Court of Appeals had interpreted § 702 as requiring either the showing of a "legal interest," as that term had been narrowly construed in our earlier cases, *e. g.*, *Tennessee Electric Power Co.* v. *TVA*, 306 U. S. 118, 137 (1939), or alternatively as requiring an explicit provision in the relevant statute permitting suit by any party "adversely affected or aggrieved."[8] See *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 406

[7] "Congress can, of course, resolve the question [of standing] one way or another, save as the requirements of Article III dictate otherwise." 397 U. S., at 154.

[8] Section 402(b) of the Communications Act of 1934, as amended, 47 U. S. C. § 402(b), is an example of a statute granting an explicit right of review to all persons adversely affected or aggrieved by particular agency actions (there, licensing actions by the Federal Communications Commission). See generally *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940).

F. 2d 837 (CA8 1969). This Court was unwilling to take so narrow a view of the APA's "'generous review provisions,'" 397 U. S., at 156 (quoting *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51 (1955)), and stated that in accordance with previous decisions the Act should be construed "not grudgingly but as serving a broadly remedial purpose," *ibid.* (citing *Shaughnessy*, *supra*, and *Rusk* v. *Cort*, 369 U. S. 367, 379–380 (1962)). Accordingly, the data processors could be "within that class of 'aggrieved' persons who, under § 702, are entitled to judicial review of 'agency action,'" 397 U. S., at 157, even though the National Bank Act itself has no reference to aggrieved persons, and, for that matter, no review provision whatsoever.[9] It was thought, however, that Congress, in enacting § 702, had not intended to allow suit by every person suffering injury in fact. What was needed was a gloss on the meaning of § 702. The Court supplied this gloss by adding to the requirement that the complainant be "adversely affected or aggrieved," *i. e.*, injured in fact, the

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[9] We have most recently reaffirmed this liberal reading of the review provisions of the APA in *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U. S. 221 (1986). There, the Cetacean Society sought judicial review of the Secretary of Commerce's refusal to carry out his alleged duty, under the Pelly Amendment to the Fishermen's Protective Act of 1967, to certify Japan for taking actions that diminished the effectiveness of the International Convention for the Regulation of Whaling. The Secretary contended, among other things, that the Cetacean Society had no private cause of action under the Pelly Amendment. We rejected this argument, holding that respondents had a right of action "expressly created by the Administrative Procedure Act (APA), which states that 'final agency action for which there is no other adequate remedy in a court [is] subject to judicial review,' § 704, at the behest of '[a] person . . . adversely affected or aggrieved by agency action.'" *Id.*, at 231, n. 4. We held further, with citations to such previous decisions as *Block* v. *Community Nutrition Institute*, 467 U. S. 340 (1984), that "[a] separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude review." *Japan Whaling*, *supra*, at 231, n. 4.

additional requirement that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*, at 153.

The Court concluded that the data processors were arguably within the zone of interests established by § 4 of the Bank Service Corporation Act of 1962, 76 Stat. 1132, 12 U. S. C. § 1864, which forbids bank service corporations to "engage in any activity other than the performance of bank services for banks." See 397 U. S., at 155. In so holding, the Court relied on a brief excerpt from the legislative history of § 4 indicating that Congress intended to enforce adherence to "the accepted public policy which strictly limits banks to banking." *Ibid.* (internal quotations omitted).[10] The data processors were therefore permitted to litigate the validity of the Comptroller's ruling.

The "zone of interest" formula in *Data Processing* has not proved self-explanatory,[11] but significant guidance can nonetheless be drawn from that opinion. *First.* The Court interpreted the phrase "a relevant statute" in § 702 broadly; the data processors were alleging violations of 12 U. S. C. § 24 Seventh, see 397 U. S., at 157, n. 2, yet the Court relied on the legislative history of a much later statute, § 4 of the Bank

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[10] Subsequently, in *Arnold Tours, Inc.* v. *Camp*, 400 U. S. 45 (1970), the Court held that, under the rationale of *Data Processing*, travel agents have standing to challenge the Comptroller's decision to allow banks, pursuant to their incidental powers under 12 U. S. C. § 24 Seventh, to provide travel services to their customers. The Court found it of no moment that Congress never specifically focused on the interests of travel agents in enacting § 4 of the Bank Service Corporation Act. 400 U. S., at 46, and n. 3.

[11] The zone test has also been the subject of considerable scholarly writing, much of it critical. See, *e. g.*, 4 K. Davis, Administrative Law Treatise § 24:17 (2d ed. 1983); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1731–1734 (1975); Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 Yale. L. J. 425 (1974); Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645 (1973); Jaffe, Standing Again, 84 Harv. L. Rev. 633, 634, and n. 9 (1971).

Service Corporation Act of 1962, in holding that the data processors satisfied the "zone of interest" test. *Second.* The Court approved the "trend . . . toward [the] enlargement of the class of people who may protest administrative action." 397 U. S., at 154. At the same time, the Court implicitly recognized the potential for disruption inherent in allowing every party adversely affected by agency action to seek judicial review. The Court struck the balance in a manner favoring review, but excluding those would-be plaintiffs not even "arguably within the zone of interests to be protected or regulated by the statute . . . ." *Id.*, at 153.[12]

The reach of the "zone of interest" test, insofar as the class of potential plaintiffs is concerned, is demonstrated by the subsequent decision in *Investment Company Institute* v. *Camp*, 401 U. S. 617 (1971). There, an association of open-end investment companies and several individual investment companies sought, among other things, review of a Comptroller's regulation that authorized banks to operate collective investment funds. The companies alleged that the regulation violated the Glass-Steagall Banking Act of 1933, which prohibits banks from underwriting or issuing securities. See 12 U. S. C. § 24 Seventh. The Comptroller urged that the plaintiffs lacked standing, to which the Court responded that plaintiffs not only suffered actual injury but, as in *Data Processing*, suffered injury from the competition that Congress had arguably legislated against by limiting the activities available to national banks.[13]

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[12] The Court's concern was to ensure that the data processors' association would be "a reliable private attorney general to litigate the issues of the public interest in the present case." 397 U. S., at 154. The language quoted is directed most immediately to the inquiry whether sufficient concrete adversity existed in the case to satisfy Article III. However, the concern that the plaintiff be "reliable" carries over to the "zone of interest" inquiry, which seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.

[13] The Court stated:

"This contention [that plaintiffs lack standing] is foreclosed by *Data Processing Service* v. *Camp*, 397 U. S. 150. There we held that companies

Justice Harlan, in dissent, complained that there was no evidence that Congress had intended to benefit the plaintiff's class when it limited the activities permitted national banks. The Court did not take issue with this observation; it was enough to provide standing that Congress, for its own reasons, primarily its concern for the soundness of the banking system, had forbidden banks to compete with plaintiffs by entering the investment company business.

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that offered data processing services to the general business community had standing to seek judicial review of a ruling by the Comptroller that national banks could make data processing services available to other banks and to bank customers. We held that data processing companies were sufficiently injured by the competition that the Comptroller had authorized to create a case or controversy. The injury to the petitioners in the instant case is indistinguishable. We also concluded that Congress did not intend 'to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under [the National Bank Act].' 397 U. S., at 157. This is precisely the review that the petitioners have sought in this case. Finally, we concluded that Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury. We noted that whether Congress had indeed prohibited such competition was a question for the merits. In the discussion that follows in the balance of this opinion we deal with the merits of petitioners' contentions and conclude that Congress did legislate against the competition that the petitioners challenge. There can be no real question, therefore, of the petitioners' standing in the light of the *Data Processing* case. See also *Arnold Tours* v. *Camp*, 400 U. S. 45." 401 U. S., at 620–621.

In the discussion of the merits that followed, the Court interpreted the Glass-Steagall Act as reflecting "a [congressional] determination that policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business were outweighed by the 'hazards' and 'financial dangers' that arise when commercial banks engage in the activities proscribed by the Act." *Id.*, at 630 (footnote omitted). The Court described these "hazards" primarily in terms of the danger to banks of making imprudent investments or risky loans, as well as the dangers of possible loss of public confidence in banks and the danger to the economy as a whole of speculation fueled by bank loans for investment purposes. *Id.*, at 629–634.

Our decision in *Block* v. *Community Nutrition Institute*, 467 U. S. 340 (1984), provides a useful reference point for understanding the "zone of interest" test. There, we held that while milk handlers have the right to seek judicial review of pricing orders issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, consumers have no such right, because "[a]llowing consumers to sue the Secretary would severely disrupt [the] complex and delicate administrative scheme." *Id.*, at 348. We recognized the presumption in favor of judicial review of agency action, but held that this presumption is "overcome whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.*, at 351 (quoting *Data Processing*, 397 U. S., at 157). The essential inquiry is whether Congress "intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law." 467 U. S., at 347 (citing *Barlow* v. *Collins*, 397 U. S. 159, 167 (1970)).

The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding;[14] in particular, there need be no indication of congressional pur-

[14] Thus, in *Data Processing*, the Court found it sufficient to establish reviewability that the general policy implicit in the National Bank Act and the Bank Service Corporation Act was "apparent" and that "those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable." 397 U. S., at 157.

pose to benefit the would-be plaintiff. *Investment Company Institute* v. *Camp*, 401 U. S. 617 (1971).[15]

The inquiry into reviewability does not end with the "zone of interest" test. In *Community Nutrition Institute*, the interests of consumers were arguably within the zone of interests meant to be protected by the Act, see 467 U. S., at 347, but the Court found that point not dispositive, because at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed.[16]

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[15] Insofar as lower court decisions suggest otherwise, see, *e. g.*, *Control Data Corp.* v. *Baldrige*, 210 U. S. App. D. C. 170, 180–181, 655 F. 2d 283, 293–294, cert. denied, 454 U. S. 881 (1981), they are inconsistent with our understanding of the "zone of interest" test, as now formulated.

[16] The principal cases in which the "zone of interest" test has been applied are those involving claims under the APA, and the test is most usefully understood as a gloss on the meaning of § 702. While inquiries into reviewability or prudential standing in other contexts may bear some resemblance to a "zone of interest" inquiry under the APA, it is not a test of universal application. *Data Processing* speaks of claims "arguably within the zone of interests to be protected or regulated by the statute *or constitutional guarantee* in question." 397 U. S., at 153 (emphasis added). We doubt, however, that it is possible to formulate a single inquiry that governs all statutory and constitutional claims. As the Court commented in *Data Processing:* "Generalizations about standing to sue are largely worthless as such." *Id.*, at 151. We have occasionally listed the "zone of interest" inquiry among general prudential considerations bearing on standing, see, *e. g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 475 (1982), and have on one occasion conducted a "zone of interest" inquiry in a case brought under the Commerce Clause, see *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 320–321, n. 3 (1977). While the decision that there was standing in *Boston Stock Exchange* was undoubtedly correct, the invocation of the "zone of interest" test there should not be taken to mean that the standing inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the "generous review provisions" of the APA apply, *Data Processing*, 397 U. S., at 156.

The difference made by the APA can be readily seen by comparing the "zone of interest" decisions discussed *supra*, at 394–398, with cases in which a private right of action under a statute is asserted in conditions that make the APA inapplicable. See, *e. g.*, *Cort* v. *Ash*, 422 U. S. 66 (1975);

In considering whether the "zone of interest" test provides or denies standing in these cases, we first observe that the Comptroller's argument focuses too narrowly on 12 U. S. C. § 36, and does not adequately place § 36 in the overall context of the National Bank Act. As *Data Processing* demonstrates, we are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act. See *supra*, at 396.

Section 36 is a limited exception to the otherwise applicable requirement of § 81 that "the general business of each national banking association shall be transacted in the place specified in its organization certificate . . . ." Prior to the enactment of § 36, § 81 had been construed to prevent branching by national banks. *Lowry National Bank*, 29 Op. Atty. Gen. 81 (1911), approved in *First National Bank in St. Louis* v. *Missouri*, 263 U. S. 640, 656–659 (1924). We have described the circumstances surrounding the enactment of § 36 as part of the McFadden Act, and its subsequent modification by the amendments added through the Bank Act of 1933, in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U. S. 252 (1966), and we will not repeat that history in

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Cannon v. *University of Chicago*, 441 U. S. 677 (1979). In *Cort*, corporate shareholders sought recovery of funds that a corporate official had expended in alleged violation of 18 U. S. C. § 610, the then-current version of the Corrupt Practices Act, which prohibits corporate expenditures and contributions for the purpose of influencing federal candidate elections. The Court gave the would-be plaintiffs the threshold burden of showing that they were "one of the class for whose *especial* benefit the statute was enacted," 422 U. S., at 78 (internal quotation omitted; emphasis in original). The shareholders argued that § 610 was motivated in part by Congress' conviction that corporate officials have no moral right to use corporate assets for political purposes. The Court, in holding that this was not enough to give the shareholders an implied right of action under § 610, observed that "the protection of ordinary stockholders was at best a secondary concern [underlying § 610]." *Id.*, at 81. Clearly, the Court was requiring more from the would-be plaintiffs in *Cort* than a showing that their interests were arguably within the zone protected or regulated by § 610.

detail here. It is significant for our present inquiry that Congress rejected attempts to allow national banks to branch without regard to state law. See *id.*, at 259. There were many expressions of concern about the effects of branching among those who supported the McFadden Act, as well as among its opponents. Allusion was made to the danger that national banks might obtain monopoly control over credit and money if permitted to branch. 66 Cong. Rec. 4438 (1925) (remarks of Sen. Reed). The sponsor of the Act himself stated that "[t]his bill is much more an antibranch-banking bill than a branch-banking bill." *Id.*, at 1582 (remarks of Rep. McFadden).[17] In short, Congress was concerned not only with equalizing the status of state and federal banks, but also with preventing the perceived dangers of unlimited branching.

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[17] Representative McFadden explained:

"[The Act] prohibits national banks from engaging in state-wide branch banking in any State (secs. 7 and 8); it prohibits a national bank from engaging in county-wide branching in any state (secs. 7 and 8); it prohibits national and State member banks [of the Federal Reserve System] from establishing any branches in cities of less than 25,000 population (secs. 8 and 9); it prohibits national banks from having any branches in any city located in a State which prohibits branch banking (sec. 8); it prohibits a national bank after consolidating with a State bank to continue in operation any branches which the State bank may have established outside of city limits (sec. 1); it prohibits a State bank upon converting into a national bank to retain in operation any branches which may have been established outside of city limits (sec. 7)." 66 Cong. Rec. 1582 (1925).

See also, *e. g.*, *id.*, at 1569 (remarks of Rep. Nelson); *id.*, at 1624–1625 (remarks of Rep. Goldsborough); *id.*, at 1633 (remarks of Rep. Williams); *id.*, at 1637 (remarks of Rep. Hull).

Congress subsequently relaxed some of the restrictions on branching to which Representative McFadden alluded in the passage quoted above. For example, statewide branching by national banks is now permitted if state law explicitly permits statewide branching by state banks. 12 U. S. C. § 36(c)(2). However, such modifications obviously do not represent an abandonment by Congress of the policy against unlimited branching.

The interest respondent asserts has a plausible relationship to the policies underlying §§ 36 and 81 of the National Bank Act. Congress has shown a concern to keep national banks from gaining a monopoly control over credit and money through unlimited branching. Respondent's members compete with banks in providing discount brokerage services—activities which give banks access to more money, in the form of credit balances, and enhanced opportunities to lend money, viz., for margin purchases. "Congress [has] arguably legislated against the competition that [respondent seeks] to challenge," *Investment Company Institute*, 401 U. S., at 620, by limiting the extent to which banks can engage in the discount brokerage business and hence limiting the competitive impact on nonbank discount brokerage houses.

These cases can be analogized to *Data Processing* and *Investment Company Institute*. In those cases the question was what activities banks could engage in at all; here, the question is what activities banks can engage in without regard to the limitations imposed by state branching law. In both cases, competitors who allege an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the Comptroller's rulings. There is sound reason to infer that Congress "intended [petitioner's] class [of plaintiffs] to be relied upon to challenge agency disregard of the law." *Community Nutrition Institute*, 467 U. S., at 347. And we see no indications of the kind presented in *Community Nutrition Institute* that make "fairly discernible" a congressional intent to preclude review at respondent's behest. We conclude, therefore, that respondent was a proper party to bring this lawsuit, and we now turn to the merits.

III

> "It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with

> the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws. See *First National Bank* v. *Missouri*, 263 U. S. 640, 658." *Investment Company Institute* v. *Camp*, *supra*, at 626–627.

See also, *e. g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985); *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116 (1985); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

Respondent contends that the Comptroller's interpretation of the Bank Act is not entitled to deference because it contradicts the plain language of the statute. Respondent relies on 12 U. S. C. § 81, which provides:

> "The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title."

In respondent's view, the unambiguous meaning of § 81 is that "national banks may locate their business only at their headquarters or licensed branches within the same state." Brief for Respondent 11. However, § 81 is considerably more ambiguous than respondent allows. The phrase "[t]he general business of each national banking association" in § 81 need not be read to encompass all the business in which the bank engages, but, as we shall explain, can plausibly be read to cover only those activities that are part of the bank's core banking functions.

Prior to 1927, the predecessor of § 81 (Rev. Stat. § 5190) provided that "the usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate." In *Lowry National Bank*, 29 Op. Atty. Gen. 81 (1911), the

Attorney General interpreted this statute to permit "a bank [to] maintain an [extra-office] agency, the power of which is restricted to dealing in bills of exchange, or possibly to some other particular class of business incident to the banking business," but to forbid "a bank to establish a branch for the transaction of a general banking business." *Id.*, at 86. The Attorney General went on to cite cases which he viewed as "recogniz[ing] a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business." *Id.*, at 87. He summarized the distinction as follows:

> "An agency requires no division of the capital stock, and the details of the business are few and are easily supervised by the officers of the bank, while a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate organization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution." *Id.*, at 87–88.

The Court subsequently approved this interpretation of § 5190 in *First National Bank in St. Louis* v. *Missouri*, 263 U. S., at 658.

The *Lowry National Bank* opinion, which is part of the background against which Congress legislated when it passed the McFadden Act in 1927, does not interpret § 5190 as requiring national banks to conduct *all* of their business at the central office. The opinion equates "the usual business of banking" with "a general banking business," and envisions branching in terms of the performance of core banking functions.

Respondent attempts to sidestep the *Lowry* opinion by arguing that Congress changed the meaning of § 5190 when, in passing the McFadden Act, it changed the words "the usual business of each national banking association" to "the general business of each national banking association." Respondent

has pointed to nothing in the legislative history of the McFadden Act, however, indicating that this change in the wording had substantive significance. We find reasonable the Comptroller's position that "the amendment simply codified the accepted notion that the 'usual business' of a bank was the 'general banking business.'" Reply Brief for Federal Petitioner 5, n. 5.

Respondent's fallback position from its "plain language" argument is that the phrase "general business" in § 81 at least refers to all activities in which Congress has specifically authorized a national bank to engage, including the trading in securities that the McFadden Act authorized by the amendment of 12 U. S. C. § 24 Seventh. See McFadden Act, ch. 191, § 2, 44 Stat. 1226. However, petitioner Security Pacific has provided a counter-example to this general thesis: In § 2(b) of the McFadden Act, Congress specifically authorized national banks' involvement in the safe-deposit business, and in doing so deleted language from the bill that arguably would have limited the bank's authority "to conduct a safe deposit business" to activities "located on or adjacent to the premises of such association." 67 Cong. Rec. 3231 (1926). In floor debates, Representative McFadden, in response to the question from Representative Celler whether the bill as amended would permit "a safe-deposit business [to be] conducted a block away or a mile away from a national banking association," replied that the deletion of the language regarding location "removes the limitations which might be very embarrassing to an institution." *Id.*, at 3232.[18] In view of this exchange, we are not persuaded that Congress intended the locational restriction of § 81 and § 36 to reach all activities in which national banks are specifically authorized to engage.

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[18] Representative Wingo then remarked that the locational language that was deleted was to make clear that the limitations on the total amount a bank can invest in the safe-deposit business applies irrespective of whether the business is conducted on or off the bank's premises. 67 Cong. Rec. 3232 (1926).

Respondent also relies on the following statement, which Representative McFadden placed in the Congressional Record 10 days after the passage of the McFadden Act, while Congress was in recess:

> "[Section 36(f)] defines the term 'branch.' Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office, is a branch if it is legally established under the provisions of this act." 68 Cong. Rec. 5816 (1927).

We do not attach substantial weight to this statement, which Congress did not have before it in passing the McFadden Act. As the Comptroller persuasively argues, Representative McFadden cannot be considered an impartial interpreter of the bill that bears his name, since he was not favorably disposed toward branch banking.[19] If we took literally Representative McFadden's view of § 36(f), we would have to conclude that Congress intended to overturn the Attorney General's opinion in *Lowry National Bank*, 29 Op. Atty. Gen. 81 (1911), which this Court had previously approved in *First National Bank in St. Louis* v. *Missouri*, *supra*, at 658. Congress never specifically indicated such an intention, and we find it hard to imagine that it would have made such a change without comment.

It is significant that in passing the McFadden Act, Congress recognized and for the first time specifically authorized the practice of national banks' engaging in the buying and selling of investment securities. See Act of Feb. 25, 1927, ch. 191, § 2, 44 Stat. 1226.[20] Prior to 1927, banks had con-

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[19] See Brief for Federal Petitioner 33–34, n. 23. See also n. 16, *supra*, and accompanying text.

[20] The legislation authorized national banks to engage in "the business of buying and selling investment securities." Banks were limited to buying and selling the securities "without recourse," and were prohibited from

ducted such securities transactions on a widespread and often interstate basis, without regard to the locational restriction imposed by § 5190 on "the usual business of each national banking association." See, *e. g.*, W. Peach, The Security Affiliates of National Banks 74 (1941); Perkins, The Divorce of Commercial and Investment Banking: A History, 88 Banking L. J. 483, 492, 494, n. 26 (1971).[21] We find it unlikely that Congress, in recognizing and explicitly authorizing this practice, would have undertaken to limit its geographic scope through the branching law without specifically noting the restriction on the prior practice.[22]

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acquiring the securities of any one issuer in an amount that exceeded 25% of the bank's capital stock. § 2, 44 Stat. 1226.

[21] Respondent treats these prior practices as "immaterial to the issue here" because in the 1920's national banks generally carried out such transactions through affiliates rather than directly owned subsidiaries. Brief for Respondent 16. However, it appears doubtful that such securities affiliates were functionally distinguishable from subsidiaries. Various devices were used to achieve identity of stock ownership between the affiliate and the bank, see W. Peach, The Security Affiliates of National Banks 66–68 (1941), and as a Senate Subcommittee later commented, "it goes without saying that, through identity of stock ownership, there is identity of real control." Operation of the National and Federal Reserve Banking Systems: Hearings Pursuant to S. Res. 71 before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3d Sess., 1052, 1057 (1931). Moreover, at the time it passed the McFadden Act, Congress did not appear to place any particular weight on the affiliate-subsidiary distinction; thus, the legislative history contains references to securities trading as "a type of business which national banks are now conducting under their incidental charter powers." S. Rep. No. 473, 69th Cong., 1st Sess., 7 (1926); H. R. Rep. No. 83, 69th Cong., 1st Sess., 3 (1926).

[22] Congress did of course later restrict the types of securities transactions in which national banks could engage, through passage of the Glass-Steagall Act in 1933. See 12 U. S. C. § 24 (1982 ed. and Supp. III); 12 U. S. C. §§ 78, 377, 378. However, Congress showed no intention of placing geographic restrictions on the location of those securities transactions in which banks could still engage. Rather, Congress emphasized that the Glass-Steagall Act permitted banks "to purchase and sell investment securities for their customers to the same extent as heretofore." S. Rep. No. 77, 73d Cong., 1st Sess., 16 (1933).

For the foregoing reasons, we conclude that Congress did not intend to subject a bank's conduct of a securities business to the branching restrictions imposed by 12 U. S. C. § 36(f). We do not view our decision today as inconsistent with our prior decisions interpreting 12 U. S. C. § 36(f) as embodying a policy of "competitive equality" between state and national banks. See, *e. g.*, *First National Bank in Plant City* v. *Dickinson*, 396 U. S. 122 (1969). The Comptroller reasonably interprets the statute as requiring "competitive equality" only in core banking functions, and not in all incidental services in which national banks are authorized to engage.[23] We are not faced today with the need to decide whether there are core banking functions beyond those explicitly enumerated in § 36(f); it suffices, to decide this case, to hold that the operation of a discount brokerage service is not a core banking function.

Accordingly, the judgment of the Court of Appeals is affirmed insofar as it held that respondent has standing, and reversed on the merits.

It is so ordered.

JUSTICE SCALIA took no part in the consideration or decision of these cases.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, concurring in part and concurring in the judgment.

Analysis of the purposes of the branching limitations on national banks demonstrates that respondent is well within the "zone of interest" as that test has been applied in our

[23] If the "competitive equality" principle were carried to its logical extreme, the ability of a national bank to carry on an incidental activity such as the safe-deposit business would be limited to the same extent as a state bank's ability to do so under state law. However, as we have noted, *supra*, at 406, the legislative history of the McFadden Act rather clearly indicates that Congress intended national banks to be able to carry on a safe-deposit business without locational restrictions.

prior decisions. Because I believe that these cases call for no more than a straightforward application of those prior precedents, I do not join Part II of the Court's opinion, which, in my view, engages in a wholly unnecessary exegesis on the "zone of interest" test. I do join the remainder of the Court's opinion, which upholds the Comptroller of the Currency's interpretation of the McFadden Act.

Petitioners' argument that respondent lacks standing to challenge the Comptroller's decision in these cases is predicated on their reading of the purpose behind the branching limitations of the McFadden Act. They argue that Congress' *only* concern in not allowing national banks to maintain more branches than their state counterparts may maintain under state law was to ensure that the national banks not use their newly granted branching authority to gain a competitive edge over state banks.[1] Close examination of the Act and its history, however, convinces me that this was not the only purpose of the branching restrictions. Rather, the McFadden Act was in large part a compromise in which Congress started from a general antibranching rule and created a limited exception just large enough to allow national banks to compete effectively with state banks, but also narrow enough to continue to serve the policy of exercising control on the financial power of national banks. The general policy against branching was based in part on a concern about the national banks' potential for becoming massive financial institutions that would establish monopolies on financial services. Petitioners' "zone of interest" argument is therefore predicated on too narrow a reading of the statutory purposes, and hence too narrow a view of the applicable zone of interest that the broad legislative scheme sought to protect.

The National Currency Act of 1863, 12 Stat. 665, and the National Bank Act of 1864, ch. 106, 13 Stat. 99, which provided, *inter alia*, for federal chartering of national banks,

[1] See Brief for Federal Petitioner 19–21; Brief for Petitioner in No. 85–972, p. 37.

ended the 57-year hiatus during which there was no federal involvement in banking. The National Bank Act in Rev. Stat. § 5190 provided that "[t]he usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate,"[2] and in 1902 the Comptroller of the Currency stated his view that this statute prohibited national banks from branching. See Annual Report of the Comptroller of the Currency, H. R. Doc. No. 10, Vol. 2, 72d Cong., 2d Sess., 45–47 (1902). In 1911 the Attorney General issued an opinion affirming that view. He explained that neither the statute nor national banks' inherent powers gave them the legal authority to establish branches. *Lowry National Bank*, 29 Op. Atty. Gen. 81, approved in *First National Bank in St. Louis* v. *Missouri*, 263 U. S. 640, 656–659 (1924).

By the early 1900's, some States, most notably California, had begun to authorize their state banks to branch. See J. Chapman & R. Westerfield, Branch Banking 84–92 (1980 reprint); G. Cartinhour & R. Westerfield, Branch, Group and Chain Banking and Historical Survey of Branch Banking in the United States 195–215 (1980 reprint). Controversy soon began to brew over the prohibition on national banks' branching. See Chapman & Westerfield, *supra*, at 92–102. Many argued that it was restraining the national banks too much; not only was it having the salutary effect of preventing the national banks from overpowering other institutions, but it was also having the negative effect of threatening the national banks' vitality by not allowing them to compete fairly with their state counterparts. Others argued that branching was inherently evil and dangerous, and that Congress should certainly not allow national banks to branch, even though Congress might not be able to prohibit States from allowing their banks to engage in branching. See generally C. Col-

[2] As amended, this statute appears at 12 U. S. C. § 81.

lins, The Branch Banking Question 2–16 (1926); S. Southworth, Branch Banking in the United States 163–184 (1928).

Congress began to focus on the branch banking issue in 1922, when the Comptroller of the Currency called for legislative action to reduce the competitive disparity. The next five years saw extensive legislative debate on the branch banking crisis and the optimum way to deal with it. See generally Collins, *supra*, at 82–110. As JUSTICE WHITE explains, *ante*, at 401–402, the legislation that was eventually passed in 1927, the McFadden Act, reflected a compromise between these factions. On the one hand, the antibranching group succeeded in preventing a wholesale abandonment of all branching restrictions; on the other hand, the probranching group succeeded in obtaining legislation that would allow national banks to establish branches within the city limits if state banks could do so. See Chapman & Westerfield, *supra*, at 108.[3]

The campaign against unlimited branch banking of national banks was far more than just a campaign to protect the local bank lobby.[4] There was real fear of the effect that a central

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[3] In their exhaustive survey of branch banking in America, Chapman and Westerfield explained that "[t]he branch bank provisions of the McFadden . . . Act represented the minimum of concession which the anti-branch bank forces were willing to make, and its general purpose was to stifle the development of branch banking and to freeze it in its status quo." See J. Chapman & R. Westerfield, Branch Banking 108 (1980 reprint); see also C. Golembe & D. Holland, Federal Regulation of Banking 1986–87, p. 134 (1986) ("McFadden Act represented a minor victory for branching advocates," and is "probably more correctly viewed as an anti-branching statute"); G. Cartinhour & R. Westerfield, Branch, Group and Chain Banking and Historical Survey of Branch Banking in the United States 285 (1980 reprint) (McFadden Act was "a sort of truce between the interests at issue on the branch bank question").

[4] Protection of state banks for their own sake was, of course, one of the legislative purposes as well. Additionally, it appears that some legislators opposed unlimited national bank branching because they thought that the States would be forced to respond by allowing their banks to branch, an action the legislators were reluctant to force on the States.

bank with unlimited branching power could have on the financial and political climate of the country.[5] Senator Reed, for example, exclaimed:

> "There are advocates of the general branch bank system. There were advocates of a single national bank, and we had one once, with branches scattered almost everywhere. It grew so arrogant and so powerful that it dared look 'Old Hickory' Jackson in the eye and tell him it could put up and pull down Presidents, and it required a vast amount of assurance for any capitalist in the world to say that to old Andrew Jackson. Andrew Jackson struck down the branch bank system, and he lives in song and story, and in the hearts of the American people, because he destroyed an institution that was creating a complete monopoly of credits and of money." 66 Cong. Rec. 4438 (1925).

The McFadden Act's branching limitations were thus geared in part "to prevent monopoly and to prevent an extreme concentration of financial power." See Hearings on Federal Branching Policy before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing, and Urban Affairs, 94th Cong., 2d Sess., p. 408 (1977) (Professor Kenneth Scott explaining various justifications for the Act). It is quite apparent that in the final compromise legislation this view was well represented.[6] See also *ante*, at 401–402, and n. 16.

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[5] Given the history of federal involvement in banking it was only natural that this concern would be prevalent. One of the factors that led to President Jackson's successful "war" against the Second Bank of the United States in 1836 was the fear of the power, financial and political, that a national bank could wield. See Veto Message of President Jackson, in Senate Journal, July 10, 22d Cong., 1st Sess., 433 (1831); G. Van Deusen, The Jacksonian Era 60–67 (1959); Golembe & Holland, *supra*, at 5.

[6] Some other portions of the McFadden Act provide additional evidence of the antibranching component of the legislation. For example, the Act stopped "the further extension of state-wide branch banking in the Federal reserve system by State member banks." H. R. Rep. No. 83, 69th Cong.,

The legislative spirit of maintaining restraints on national banks' branching while allowing them just enough flexibility to compete with state banks was again in force six years later when Congress enacted the Banking Act of 1933 (Glass-Steagall Act), 48 Stat. 162, which allowed national banks to maintain branches outside of their home cities if state banks could. See 12 U. S. C. § 36(c)(1). As the Court explained in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U. S. 252 (1966), the actual impetus for the changes in the branching rules at that time was the Comptroller of the Currency's advocacy of a total elimination of all branching restrictions. See *id.*, at 259 (citing Hearings before a Subcommittee of the Senate Committee on Banking and Currency pursuant to S. Res. No. 71, 71st Cong., 3d Sess., 7–10 (1931)). The proposal engendered the same sort of debate that the McFadden Act had, with some seeking a total lifting of restrictions on branch banking, and others wanting no further relaxation of the restrictions. See, *e. g.*, S. Rep. No. 584, 72d Cong., 1st Sess. (1932); 76 Cong. Rec. 9890–9899 (1932).

In setting out the reasons for their opposition, many Members of Congress described the issue in terms of stopping the undue concentration of financial power. For example, when the Senate Committee on Banking and Currency reported out a bill which would have allowed national banks to establish branches without regard to state law, the minority Report complained:

> "Advocates of the branch-banking system ignore the fact that such a system has never been tried in a country of 120,000,000 population, 3,000 miles across. They ignore the tendency in this country to centralize control of everything, and especially of credit. I believe that the branch-banking system would put us at the mercy of the

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1st Sess., 7 (1926) (quoted in *First National Bank* v. *Walker Bank & Trust Co.* 385 U. S. 252, 257 (1966)).

financial centers." S. Rep. No. 584, *supra*, at 3 (minority views).

The bill discussed in that Report was not enacted; instead, in the midst of a filibuster by the antibranching forces, another compromise was reached, which continued to contain a general limitation on branching. As one of the conferees explained, "the controversy over the respective merits of what are known as 'unit banking' and 'branch banking systems,' a controversy that has been alive and sharp for years," was not settled. "It is not . . . here proposed to give the advocates of branch banking any advantage." 77 Cong. Rec. 5896 (1933) (remarks of Rep. Luce).[7]

Petitioners therefore misconstrue the statute when they assert that the sole purpose of the restriction on branching was to ensure that national banks not use their new branching power to gain a competitive advantage over state banks, whose branching power was limited by state law. Petitioners argue that the McFadden Act represented a rejection of any earlier or contemporaneous sentiment against branch banking in general, and that the restrictions were merely a throw-in to protect the state banks whose own States may have precluded them from branching. Were that really the case, I would agree that other competitors were merely incidental beneficiaries of the legislation, and that respondent,

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[7] Similarly, the evidence surrounding passage of the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U. S. C. § 1841 *et seq.*, which eliminated a "loophole" in the McFadden Act by restricting interstate purchases of banks by bank holding companies, see *Northeast Bancorp, Inc.* v. *Board of Governors, FRS*, 472 U. S. 159, 169 (1985), evinces a legislative purpose that went beyond merely protecting local bank branches. See, *e. g.*, H. R. Rep. No. 609, 84th Cong., 1st Sess., 2 (1955) ("Ultimately, monopolistic control of credit could entirely remold our fundamental political and social institutions"); 101 Cong. Rec. 8030 (1955) (remarks of Rep. Rains) (bill is necessary "to close up and nail down the loopholes in our banking laws—loopholes which threaten not just the local independent bank but the whole traditional banking system as we know it and want to keep it").

which does not represent state banks, would fall outside of the protected zone of interest.

But this argument is not faithful to the actual history. Instead, it is clear that Congress maintained restrictions on branching for all the reasons that have been cited. The exception that was created in 1927 and broadened in 1933 was merely a concession to the reality that unless national banks could establish at least some branches they could not effectively compete with state banks that could legally branch. While protecting state banks from the effects of the new branching power was certainly *one* of Congress' goals, it is equally certain that the legislation also sought to control national banks for the sake of the aforementioned broader competitive interests.[8]

Given this understanding of the multiple purposes behind the branch banking restrictions, this case falls squarely within our decisions in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970); *Arnold Tours, Inc.* v. *Camp*, 400 U. S. 45 (1970); and *Investment Company Institute* v. *Camp*, 401 U. S. 617 (1971). Just as the Court found in *Association of Data Processing Service Organizations* and *Arnold Tours*, there is embodied in the antibranching rule of the McFadden Act a congressional purpose to protect competitors of national banks in order to ensure that national banks remain limited entities. Although much of Congress' attention focused on national banks' most obvious competititors—state banks—there is no reason to believe that Congress "desired to protect" state

[8] In analyzing current policy toward branch banking, the Department of the Treasury similarly stressed the variety of the issues that are involved: "Several additional issues must be considered in the analysis of geographical restrictions and the prospects of liberalization: competition and concentration, credit availability and service to the local community, the survival of small banks, the safety and soundness of the banking system, and the dual banking system." Department of Treasury, Geographic Restrictions on Commercial Banking in the United States: The Report of the President 12 (1981).

banks "alone from competition." *Arnold Tours*, *supra*, at 46.

Because I would decide the standing issue on this ground alone, I decline to join the Court's sweeping discussion of the "zone of interest" test. There will be time enough to deal with the broad issues surrounding that test when a case requires us to do so.

WRIGHT ET AL. *v.* CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85–5915. Argued October 6, 1986—Decided January 14, 1987

The Brooke Amendment to the Housing Act of 1937 imposed a ceiling on rents charged to low-income persons living in public housing projects, and, as later amended, provides that a low-income family "shall pay as rent" a specified percentage of its income. The Department of Housing and Urban Development (HUD) has consistently considered "rent" to include a reasonable amount for the use of utilities. Petitioners, tenants living in low-income housing projects owned by respondent, brought suit in Federal District Court under 42 U. S. C. § 1983, alleging that respondent overbilled them for their utilities and thereby violated the rent ceiling imposed by the Brooke Amendment and implementing regulations. The District Court granted summary judgment for respondent, holding that a private cause of action was unavailable to enforce the Brooke Amendment. The Court of Appeals affirmed, holding that while the Brooke Amendment confers rights on tenants, these rights are enforceable only by HUD.

Held:

1. Nothing in the Housing Act or the Brooke Amendment evidences that Congress intended to preclude petitioners' § 1983 claim against respondent. Not only are the Brooke Amendment and its legislative history devoid of any express indication that exclusive enforcement authority was vested in HUD, but also both congressional and agency actions have indicated that enforcement authority is not centralized and that private actions were anticipated. Neither are the remedial mechanisms provided by the statute sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action for the enforcement of tenants' rights secured by federal law. Pp. 423–429.

2. There is no merit to respondent's argument that the provision for a "reasonable" allowance for utilities is too vague and amorphous to confer on tenants an enforceable "right" within the meaning of § 1983 and that the matter of utility allowances must be left to the public housing authorities, subject to HUD's supervision. The benefits Congress intended to confer on tenants are sufficiently specific and definite to qual-

ify as enforceable rights under § 1983 and are not beyond the judiciary's competence to enforce. Pp. 429–430.

771 F. 2d 833, reversed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and POWELL and SCALIA, JJ., joined, *post*, p. 432.

Henry L. Woodward argued the cause for petitioners. With him on the briefs was *Renae Reed Patrick*.

Bayard E. Harris argued the cause and filed a brief for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

Petitioners in this case, tenants living in low-income housing projects owned by respondent, brought suit under 42 U. S. C. § 1983,[1] alleging that respondent overbilled them for their utilities and thereby violated the rent ceiling imposed by the Brooke Amendment to the Housing Act of 1937, and the implementing regulations of the Department of Housing and Urban Development (HUD). The District Court, 605 F. Supp. 532 (WD Va. 1984), and the Court of Appeals for the Fourth Circuit, 771 F. 2d 833 (1985), concluded that petitioners did not have a cause of action under § 1983. We granted certiorari and now reverse.

I

Respondent is one of many public housing authorities (PHA's) established throughout the country under the United

**David B. Bryson* and *Catherine M. Bishop* filed a brief for the National Housing Law Project as *amicus curiae* urging reversal.

[1] "[42 U. S. C.] § 1983. Civil action for deprivation of rights:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

States Housing Act of 1937, ch. 896, 50 Stat. 888, 42 U. S. C. § 1401 *et seq.*, (1970 ed.), to provide affordable housing for low-income people. In 1969, the Housing Act was amended in a fundamental respect: the Brooke Amendment, Pub. L. 91–152, § 213, 83 Stat. 389, imposed a ceiling for rents charged to low-income people living in public housing projects, and, as later amended, Pub. L. 97–35, § 322, 95 Stat. 400, provides that a low-income family "shall pay as rent" a specified percentage of its income.[2] HUD has consistently considered "rent" to include a reasonable amount for the use of utilities, which is defined by regulation as that amount equal to or less than an amount determined by the PHA to be a reasonable part of the rent paid by low-income tenants.[3]

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[2] The Brooke Amendment in its present form reads as follows:

"§ 1437a. Rental payments

"(a) Families included; amount

"Dwelling units assisted under this chapter shall be rented only to families who are lower income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. A family shall pay as rent for a dwelling unit assisted under this chapter (other than a family assisted under section 1437f(o) of this title) the highest of the following amounts, rounded to the nearest dollar:

"(1) 30 per centum of the family's monthly adjusted income;

"(2) 10 per centum of the family's monthly income; or

"(3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated." 42 U. S. C. § 1437a (1982 ed. and Supp. III).

The language of the original Brooke Amendment required that low-income tenant's rent "may not exceed one-fourth of the family's income, as defined by the Secretary."

[3] The complaint was filed December 8, 1982. The regulations in effect at that time defined "contract rent," that is, the amount actually charged to low-income tenants, as follows:

"Contract rent means the rent charged a tenant for the use of the dwelling accommodation and equipment (such as ranges and refrigerators but not including furniture), services, and reasonable amounts of utilities de-

In their suit against respondent, petitioners alleged that respondent had overcharged them for their utilities by failing to comply with the applicable HUD regulations in establishing the amount of utility service to which petitioners were entitled. Thus, according to petitioners, respondent imposed a surcharge for "excess" utility consumption that should have been part of petitioners' rent[4] and deprived them of their

termined in accordance with the PHA's [public housing authority's] schedule of allowances for utilities supplied by the project. Contract rent does not include charges for utility consumption in excess of the public housing agency's schedule of allowances for utility consumption, or other miscellaneous charges . . . ." 24 CFR § 860.403 (1982).

The relevant regulations were originally promulgated as an interim rule on September 9, 1980. 45 Fed. Reg. 59502 (1980). As there noted, HUD had previously regulated the way in which utility charges were dealt with in HUD's Local Housing Authority Management Handbook, pt. 2, § 9, Controlling Utility Consumption and Costs (1963). *Ibid.* On August 13, 1982, HUD published a proposed rule to amend the interim regulations, commenting as follows with respect to the inclusion of utilities in the calculation of rent:

"In administering the low-income public housing program under the United States Housing Act of 1937, as amended, HUD historically has considered 'rent' to include shelter cost plus a reasonable amount for utilities. As a result, even prior to adoption of the 'Brooke Amendment' in 1969 (limiting the amount of 'rent' chargeable to public housing tenants to a stated percentage of income, then 25 percent), HUD provided for a system under which allowances were established as part of the rent schedule showing the amounts of electricity in kilowatt-hours to which tenants were entitled." 47 Fed. Reg. 35249–35250 (1982).

The regulation was finally amended on August 7, 1984. 49 Fed. Reg. 31399 (1984). The Supplementary Information section of the published regulation contains a discussion which underscores the fact that HUD has traditionally treated "rent" to include a reasonable amount of utility usage. *Id.*, at 31400. That section also provides an overview of the development of the utility regulations at issue here.

The dissent may have a different view, but to us it is clear that the regulations gave low-income tenants an enforceable right to a reasonable utility allowance and that the regulations were fully authorized by the statute.

[4]The applicable regulations, 24 CFR § 865.470 *et seq.* (1983), require housing authorities like respondent to, *inter alia*, recalculate their utility allowances on the basis of current data, to set the allowances in such a fash-

statutory right to pay only the prescribed maximum portion of their income as rent.[5] The District Court granted summary judgment for respondent on petitioners' § 1983 claim, holding that a private cause of action was unavailable to enforce the Brooke Amendment. The Court of Appeals for the Fourth Circuit affirmed. Relying primarily on two of its earlier decisions, *Perry* v. *Housing Authority of Charleston*, 664 F. 2d 1210 (1981), and *Phelps* v. *Housing Authority of Woodruff*, 742 F. 2d 816 (1984), the Court of Appeals held that while the Brooke Amendment confers certain rights on tenants, these rights are enforceable only by HUD, not by the individual tenant: "[T]he situation is very analogous to the one in which a trustee [that is, HUD], not the *cestui que trust*, must bring suit." 771 F. 2d, at 836.[6]

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ion that 90 percent of a particular authority's dwelling units do not pay surcharges, and to review tenant surcharges quarterly and consider revision of the allowances if more than 25 percent of any category of units are being surcharged.

[5] The complaint also contained a claim against respondent for breach of paragraph 4 of the standard lease agreement providing:

"Utilities: Management Agent agrees to furnish at no charge to the Resident the following utilities as reasonably necessary: hot and cold water, gas for cooking, and electricity for lighting and general household appliances and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the leased unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office." Record, Exh. H.

The original complaint asked for both injunctive relief and recovery of whatever amount respondent allegedly overcharged petitioners. Pursuant to new HUD regulations, respondent revised its allowances for reasonable utility use. Petitioners are now seeking only recovery of alleged past improper charges. Brief for Petitioners 8.

Petitioners asserted that while their right to sue on the lease derives from state law, the lease claim is controlled by federal law and hence is within the jurisdiction of the federal courts under 28 U. S. C. § 1331.

[6] The court acknowledged that its conclusion that the Brooke Amendment created no enforceable rights in petitioners conflicted with the Sec-

II

Maine v. *Thiboutot*, 448 U. S. 1 (1980), held that § 1983 was available to enforce violations of federal statutes by agents of the State. *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), and *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981), however, recognized two exceptions to the application of § 1983 to remedy statutory violations: where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983. In *Pennhurst*, a § 1983 action did not lie because the statutory provisions were thought to be only statements of "findings" indicating no more than a congressional preference—at most a "nudge in the preferred directio[n]," 451 U. S., at 19, and not intended to rise to the level of an enforceable right. In *Sea Clammers*, an intent to foreclose resort to § 1983 was found in the comprehensive remedial scheme provided by Congress, a scheme that itself provided for private actions and left no room for additional private remedies under § 1983. Similarly, *Smith* v. *Robinson*, 468 U. S. 992, 1012 (1984), held that allowing a plaintiff to circumvent the Education of the Handicapped Act's administrative remedies would be inconsistent with Congress' carefully tailored scheme, which itself allowed private parties to seek remedies for violating federal law. Under these cases, if there is a state deprivation of a "right" secured by a federal statute, § 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement. "We do not lightly

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ond Circuit's decision in *Beckham* v. *New York City Housing Authority*, 755 F. 2d 1074 (1985). The court stated, however, that this decision "must yield to the authority of *Perry* and *Phelps*, *supra*, from our own circuit." 771 F. 2d, at 837, n. 8.

conclude that Congress intended to preclude reliance on § 1983 as a remedy" for the deprivation of a federally secured right. *Ibid.*

Here, the Court of Appeals held that the statute and the Brooke Amendment clearly manifested congressional intention to vest in HUD the exclusive power to enforce the benefits due housing project tenants and hence the intention to foreclose both a private cause of action under the Housing Act and any private enforcement under § 1983. For the Court of Appeals, the barrier was not the lack of statutory right or its quality or enforceability—"the plaintiffs under 42 U. S. C. § 1437a have certain rights," 771 F. 2d, at 837—but the fact that Congress had not intended tenants to have the authority themselves to sue: "HUD alone may, as quasi trustee, take legal action, for the right is explicitly tailored not to allow the beneficiaries, the low cost housing tenants, to do so." *Ibid.*

We disagree with the Court of Appeals' rather summary conclusion that the administrative scheme of enforcement foreclosed private enforcement. The Court of Appeals merely relied on one of its prior cases which had referred to HUD's authority to enforce the annual contributions contracts between PHA's and HUD, see 42 U. S. C. § 1437c, to conduct audits and to cut off funds. HUD undoubtedly has considerable authority to oversee the operation of the PHA's. We are unconvinced, however, that respondent has overcome its burden of showing that "the remedial devices provided in [the Housing Act] are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Sea Clammers*, *supra*, at 20. They do not show that "Congress specifically foreclosed a remedy under § 1983." *Smith* v. *Robinson*, *supra*, at 1004–1005, n. 9. Not only are the Brooke Amendment and its legislative history devoid of any express indication that exclusive enforcement authority was vested in HUD, but there have also been both congressional and agency actions indicating that

enforcement authority is not centralized and that private actions were anticipated. Neither, in our view, are the remedial mechanisms provided sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action for the enforcement of tenants' rights secured by federal law.

In 1981, Congress changed the maximum percentage of income that could be paid as "rent" from 25 percent to 30 percent. Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35, § 322, 95 Stat. 400. In making this change, Congress gave the Secretary of HUD discretion to raise tenants' rent incrementally over a 5-year period to ease the burden on low-income tenants during the transition. § 322(i), 95 Stat. 404. To avoid a potential multitude of litigation over the way in which the Secretary implemented the phased-in rate increase, Congress specifically made the Secretary's decisions effectuating the phase-in immune from judicial review. § 322(i)(3). At congressional hearings in which this specific and limited exception to judicial review was discussed, HUD representatives explained that this exception had no effect on tenants' ability to enforce their rights under the Housing Act in federal court other than the limited exception concerning the phase-in.[7] Apparently dissatisfied with even a tempo-

[7] In response to a question by Congressman Vento concerning the reason for the exception to judicial review, a representative of HUD explained that this limited exception had no effect on tenants' ability to protect their rights other than limiting their right to challenge the Secretary's actions in implementing the phase-in:

"MR. VENTO. Well, has this been a special problem? Usually we don't exempt people from going to the district court unless there has been some problem that has developed. Has there been that type of a problem in the past?

"MR. HOVDE. I will call upon Mr. Hipps for a response.

"MR. HIPPS. In direct answer to your question, yes, we have had a lot of litigation involving tenants rights over the past several years. The provision that you have raised a question about is addressed only at the 5-year phase in of the increase, and is not intended, as I understand, to eliminate any tenants rights beyond that point." Hearings on Housing and Commu-

rary preclusion of judicial review, Congress repealed it two years later. Pub. L. 98–181, § 206(e), 97 Stat. 1181.

Also at odds with the holding that HUD has exclusive authority to enforce the Brooke Amendment is the enactment in 1985 of 42 U. S. C. § 1437d(k) (1982 ed., Supp. III), which directed HUD to continue its longstanding regulatory requirement that each PHA provide formal grievance procedures for the resolution of tenant disputes with the PHA arising out of their lease or PHA regulations. These procedures, which Congress ordered continued, include informal and formal hearings and administrative appeals, conducted within each PHA by impartial decisionmakers, to consider adverse decisions taken against tenants by the PHA. Congress' aim was to provide a "decentralized, informal, and relatively non-adversarial administrative process" for resolving tenant-management disputes. *Samuels* v. *District of Columbia*, 248 U. S. App. D. C. 128, 133, 770 F. 2d 184, 189 (1985). The procedures are open to individual grievances but not to class actions. See 24 CFR § 966.51(b) (1986). HUD itself has never provided a procedure by which tenants could complain to it about the alleged failures of PHA's to abide by their annual contribution contracts, the Brooke Amendment, or HUD regulations; nor has it taken unto itself the task of reviewing PHA grievance procedure decisions. Moreover, § 966.57(c) of HUD's grievance procedure regulations provides that a decision terminating a grievance proceeding shall in no way affect the rights of a tenant either to seek "trial *de novo* or judicial review in any judicial proceedings, which may thereafter be brought in the matter." HUD thus had no thought that its own supervisory powers or the grievance system that it had established foreclosed resort to the courts by tenants who claimed that a PHA was not observing the commands of the Brooke Amendment.

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nity Development Amendments before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs, 97th Cong., 1st Sess., pt. 1, p. 654 (1981).

There is other evidence clearly indicating that in HUD's view tenants have the right to bring suit in federal court to challenge housing authorities' calculations of utility allowances. Among HUD's 1982 proposed regulations was § 865.476(d), 47 Fed. Reg. 35249, 35254 (1982), which would have confined tenant utility-allowance challenges to the procedures available in state court. The final regulation, however, contained no such limitation and contemplated that tenants could challenge PHA actions in federal as well as state courts. 24 CFR § 965.473(e) (1985). As the comment accompanying the final regulation explained, the proposal to limit challenges to state-court actions had been abandoned. The final "provision does not preclude Federal court review." 49 Fed. Reg. 31403 (1984). HUD's opinion as to available tenant remedies under the Housing Act is entitled to some deference by this Court. See *Jean* v. *Nelson*, 472 U. S. 846, 865 (1985); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984).

In both *Sea Clammers* and *Smith* v. *Robinson*, the statutes at issue themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy. There is nothing of that kind found in the Brooke Amendment or elsewhere in the Housing Act. Indeed, the only private remedy provided for is the local grievance procedures which the Act now requires. These procedures are not open to class grievances; and even if tenants may grieve about a PHA's utility allowance schedule, which petitioners dispute,[8] the existence of a state adminis-

[8] Petitioners assert that the grievance mechanism is not available for challenges to the general utility allowance schedules. They rely on HUD statements to this effect, the first in 1984 in connection with the issuance of formal regulations, 49 Fed. Reg. 31407:

"Some legal services organizations recommended that grievance procedures should apply to the utility allowance provisions. Grievance procedures under former Part 866 (now Part 966) apply to individual, not class, grievances so that challenges to the general utility allowance schedules would be precluded. The Department believes that procedures to be fol-

trative remedy does not ordinarily foreclose resort to § 1983. See *Patsy* v. *Board of Regents of Florida*, 457 U. S. 496, 516 (1982).

The Court of Appeals and respondents rely on HUD's authority to audit, enforce annual contributions contracts, and cut off federal funds. But these generalized powers are insufficient to indicate a congressional intention to foreclose § 1983 remedies. Cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 704–707 (1979); *Rosado* v. *Wyman*, 397 U. S. 397, 420 (1970). HUD has the authority to audit, but it does not do so frequently and its own Handbook requires audits only every eight years.[9] There are no other mechanisms provided to enable HUD to effectively oversee the performance of the some 3,000 local PHA's across the country. The statute does not require and HUD has not provided any formal procedure for tenants to bring to HUD's attention alleged PHA failures to abide by the Brooke Amendment and HUD regulations. Hence, there will be little occasion to exercise HUD's power to sue PHA's to enforce the provisions of the

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lowed on claims for individual relief under § 965.479 should be left to PHA determination."

The second statement by HUD was in connection with proposing new grievance hearing regulations in 1986, 51 Fed. Reg. 26528:

"(a) *Purpose of informal hearing.* (1) The grievance procedure shall provide the Family an opportunity for an informal hearing to review proposed PHA adverse action. The purpose of the informal hearing shall be to review whether the proposed adverse action by the PHA is in accordance with the lease, or with the law, HUD regulations or PHA rules.

"(2) PHA action or non-action concerning general policy issues or class grievances (including determination of the PHA's schedules of allowances for PHA-furnished utilities or of allowances for Tenant-purchased utilities) does not constitute adverse action by the PHA, and the PHA is not required to provide the opportunity for a hearing to consider such issues or grievances."

[9] United States Dept. of Housing and Urban Development, Field Office Monitoring of Public Housing Agencies (PHAs) 6–1 (Handbook 7460.7, Rev. Sept. 9, 1985).

annual contributions contracts. Respondent asserts PHA's must annually file their utility allowance schedules with HUD and that HUD must approve them, but the final regulations eliminated HUD's duty to approve these schedules before their effective date. 24 CFR § 965.473(d) (1986). Review of the schedules would be done in the course of audits or reviews of PHA operations.[10]

Lastly, it is said that tenants may sue on their lease in state courts and enforce their Brooke Amendment rights in that litigation. Perhaps they could, but the state-court remedy is hardly a reason to bar an action under § 1983, which was adopted to provide a federal remedy for the enforcement of federal rights.

In sum, we conclude that nothing in the Housing Act or the Brooke Amendment evidences that Congress intended to preclude petitioners' § 1983 claim against respondent.

III

Although the Court of Appeals read the Brooke Amendment as extending to housing project tenants certain rights enforceable only by HUD, respondent asserts that neither the Brooke Amendment nor the interim regulations gave the

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[10] HUD explained, 49 Fed. Reg. 31403 (1984), as follows:

"In a related issue, legal service organizations expressed concern about the absence of any HUD review of the PHA's allowance determination.

"HUD's regulatory reform goals include the removal of unnecessary reviews and approvals of actions by responsible parties having equal or greater information at hand. This is particularly appropriate in the case of public housing in view of the '37 Act's injunction that '[I]t is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of their housing programs.' 42 U. S. C. 1437. The Department believes that the definition of standards in § 965.476, combined with the record and notice provisions added to § 965.473, should adequately assure the reasonableness of PHA determinations so as to obviate the necessity or usefulness of HUD review and approval before implementation of PHA-determined allowances."

tenants any specific or definable rights to utilities, that is, no enforceable rights within the meaning of § 1983. We perceive little substance in this claim. The Brooke Amendment could not be clearer: as further amended in 1981, tenants could be charged as rent no more and no less than 30 percent of their income. This was a mandatory limitation focusing on the individual family and its income. The intent to benefit tenants is undeniable. Nor is there any question that HUD interim regulations, in effect when this suit began, expressly required that a "reasonable" amount for utilities be included in rent that a PHA was allowed to charge, an interpretation to which HUD has adhered both before and after the adoption of the Brooke Amendment. HUD's view is entitled to deference as a valid interpretation of the statute, and Congress in the course of amending that provision has not disagreed with it.[11]

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[11] We thus reject respondent's argument that the Brooke Amendment's rent ceiling applies only to the charge for shelter and that the HUD definition of rent as including a reasonable charge for utilities is not authorized by the statute.

The dissent misconstrues our discussion of the Omnibus Budget Reconciliation Act of 1981 and the enactment of the grievance procedures as codified at 42 U. S. C. § 1437d(k) (1982 ed., Supp. III). Our conclusion that low-income tenants have a right to a reasonable amount of utilities does not come from these two congressional Acts. Rather, these Acts and their history show that Congress did not close the courthouse door to low-income tenants by establishing an alternative enforcement mechanism.

The dissent is also quite wrong in concluding that HUD's "regulations indicate that while it did not have the authority finally to resolve the question, HUD viewed utilities determinations as a matter for state rather than federal courts." *Post*, at 440. It is true that the 1982 proposed regulations would have confined review of PHA utility allowances to state forums, but it was never indicated that the governing law was state rather than federal law; and in the final regulations, even the provision making PHA determinations final unless overturned in state courts was deleted. HUD thus abandoned any attempt to foreclose resort to federal courts and surely negated any conclusion that PHA determinations were not judicially reviewable. The Supplemental Information section to HUD's final regula-

Respondent nevertheless asserts that the provision for a "reasonable" allowance for utilities is too vague and amorphous to confer on tenants an enforceable "right" within the meaning of § 1983 and that the whole matter of utility allowances must be left to the discretion of the PHA, subject to supervision by HUD. The regulations, however, defining the statutory concept of "rent" as including utilities, have the force of law, *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 294–295 (1979), they specifically set out guidelines that the PHAs

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tions contains the following revealing discussion, 49 Fed. Reg. 31403 (1984):

"*C. Review of PHA Decisions by State Courts*

"The National Housing Law Project and other legal service groups challenged, as illegal, proposed § 865.476(d) which would make PHA determinations of allowances and revisions thereof final unless found, upon review pursuant to such procedures as may be available under State or local law, to be arbitrary or capricious.

"The commenters challenged HUD's power (1) to prescribe a standard of review for State courts, and (2) to divest Federal court of jurisdiction over cases involving questions of compliance with Federal statutes and regulations.

"State procedures for review of actions by administrative bodies created under State law frequently have provided a forum for review of agency determinations that involve questions of Federal law. Such State law proceedings may be more accessible to public housing tenants in some localities than a Federal court. Moreover, the Department believes that State courts are fully competent to review determinations by authorities created under State law.

"Nevertheless, the Department also recognizes that some plaintiffs may prefer to challenge PHA determinations in Federal rather than State court and that the Department's power to preclude access to Federal court is doubtful. The Department also recognizes that not all States may have adopted procedures providing for judicial review of administrative action. Accordingly, this provision (transferred to § 965.473(e)) has been revised (i) to expand the standard of review to 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' (compare Section 706 of the Administrative Procedure Act, 5 U. S. C. 706(2)), and (ii) to state that such standard of review will govern 'except where a different standard of review is applicable in review procedures governed by applicable State law.' This provision does not preclude Federal court review."

were to follow in establishing utility allowances, and they require notice to tenants and an opportunity to comment on proposed allowances. In our view, the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983, rights that are not, as respondent suggests, beyond the competence of the judiciary to enforce.[12]

The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE SCALIA join, dissenting.

As the Court's opinion acknowledges, there must be a deprivation "of a 'right' secured by a federal statute" before 42 U. S. C. § 1983 provides a remedial cause of action. *Ante*, at 423. Petitioners' claim of a federally enforceable "right" raises three distinct questions. The first question is whether the Brooke Amendment to the Public Housing Act of 1937, Pub. L. 91–152, § 213, 83 Stat. 389 (1969), itself has created an enforceable right to utilities. The second is whether, in the absence of any indication of congressional intent to create a right to utilities, administrative regulations can create such a right. The third is whether, assuming administrative regulations alone could create a right enforceable in a § 1983 action, the regulations at issue in this case have established standards capable of judicial interpretation and application.

Whether a federal statute confers substantive rights is not an issue unique to § 1983 actions. In implied right of action

[12] Petitioners also argue that the District Court has subject-matter jurisdiction to consider their breach-of-lease claims given the federal nature of the rights contained in their leases. In light of our decision that petitioners have a § 1983 claim, the District Court can certainly exercise pendent jurisdiction over petitioners' breach-of-lease claims. We offer no opinion as to whether the District Court has jurisdiction to consider only their breach-of-lease claims irrespective of their § 1983 claim.

cases, the Court also has asked, since *Cort* v. *Ash*, 422 U. S. 66, 78 (1975), whether "the statute create[s] a federal right in favor of the plaintiff." In determining whether a statute creates enforceable rights, the "key to the inquiry is the intent of the Legislature." *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13 (1981). We have looked first to the statutory language, to determine whether it is "phrased in terms of the persons benefited," *Cannon* v. *University of Chicago*, 441 U. S. 677, 692, n. 13 (1979), and is cast in mandatory rather than precatory terms. See *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 18 (1981). We then have reviewed the legislative history of the statute and other traditional aids of statutory interpretation to determine congressional intent to create enforceable rights. See *Sea Clammers*, *supra*, at 13.

Petitioners in this case assert that the Brooke Amendment creates an enforceable right to have "reasonable utilities" included in the limitation on the "rent" they may be charged by a public housing authority (PHA). The Brooke Amendment, as amended, Pub. L. 97–35, § 322, 95 Stat. 400, provides that a low-income family "shall pay as rent" a specified percentage of its monthly income for publicly assisted housing. The Court concludes that the statute's language satisfies the standards we have used in ascertaining an intent to create substantive rights: it is phrased in mandatory and not merely precatory terms, and it places an unmistakable focus on the benefited class. *Ante*, at 430. The statute also is phrased using right-creating language rather than being framed "simply as a general prohibition or a command to a federal agency." *University Research Assn.* v. *Coutu*, 450 U. S. 754, 772 (1981).

Assuming, as the Court finds, that Congress intended to create an enforceable right to a limitation on the amount PHA's may charge "as rent," the question remains whether petitioners' claim to reasonable utilities comes within the

scope of the right that Congress intended to confer. On the face of the statute, there is nothing to suggest that Congress intended that utilities be included within the statutory entitlement. "Rent" in ordinary usage simply means consideration paid for the use or occupation of property, and the statute does not suggest congressional intent to adopt a broader construction of the term.

The legislative history of the Brooke Amendment, far from indicating an intent to create a statutory right to utilities, shows that Congress was presented with, and ultimately rejected, a proposal to create an enforceable right to "reasonable utilities." As originally reported out of the Senate, Senator Brooke's bill enumerated a range of shelter costs in addition to "rent" that were to be subject to the statutory rent limit. The Senate bill provided that the term "rental" was to include "the proportionate share attributable to the unit of the total shelter costs to be borne by the tenants in a low-rent housing project, *including any separate charges to a tenant for reasonable utility use and for public services and facilities.*" 115 Cong. Rec. 26726 (1969) (emphasis added). In the bill reported out of Conference, however, this reference to utilities was deleted. The Conference Report stated that the substitute bill "retain[ed] the basic concept" of the Senate bill by "generally limiting rents that may be charged to no more than 25% of [the tenant's] income," but it included no reference to the utilities charges provided for in the Senate bill. See H. R. Conf. Rep. No. 91–740, p. 30 (1969). In adopting the Brooke Amendment, therefore, Congress deliberately refrained from including "charges to a tenant for reasonable utility use and for public services and facilities" within the statutory entitlement.

The Court does not find that the statute's language or legislative history supports its conclusion that Congress intended to create a statutory entitlement to reasonable utilities. Instead, the Court concludes that the Department of Housing and Urban Development (HUD) has so interpreted

the statute, and that "HUD's view is entitled to deference as a valid interpretation" of the Brooke Amendment. *Ante*, at 430. In my view, HUD's treatment of utilities since enactment of the Brooke Amendment will not bear the construction that the Court places upon it. Before passage of the Brooke Amendment, HUD's Local Housing Authority Management Handbook, pt. 2, § 9, Controlling Utility Consumption and Costs (1963), which provided guidelines for PHA's to use in calculating utility allowances, had established "no mandatory Federal standards, leaving the establishment of Allowances entirely to local discretion." 45 Fed. Reg. 59502 (1980). After enactment of the Brooke Amendment, HUD did not immediately promulgate new regulations fixing the amount of utilities that should be provided under the statute. Instead, the Handbook remained in effect for the next 11 years, until 1980, with the PHA's retaining complete discretion in the establishment of utilities allowances. Thus, HUD viewed the amount of utilities to be included under the Brooke Amendment's rental limitation as a question for local housing authorities—it was not a matter of federal entitlement.

The 1980 interim regulations on which petitioners rely do not reflect a different understanding on the part of the agency.[1] The reason given for adopting a uniform federal

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[1] The interim regulations provided:

"§ 865.477. Standards for allowances for PHA-furnished utilities.

"The Allowances for PHA-Furnished Utilities for each dwelling unit category and unit size shall be established in terms of consumption units, sufficient to meet the requirements of about 90% of the dwelling units in the category. Conversely, the Allowances should be such as are likely to result in surcharges for about 10% of the dwelling units. The basic method of determining the Allowances should be as follows:

"(a) The dwelling unit consumption data for all units within each dwelling unit category and unit size should be listed in order from low to high consumption for each billing period.

"(b) The PHA should determine whether there are any unusually high instances of consumption which might be due to unusual individual circum-

rule was administrative: it would be in "the best interests of the program" because it would "alleviate confusion and controversy" arising under the nonmandatory regime. 45 Fed. Reg. 59502 (1980). Noting that "many PHAs have been establishing utility allowances based on the HUD Guide," the agency sought to develop a uniform standard following "the general concepts" of the 1963 Handbook. *Ibid.* However, the uniform standards promulgated in the interim regulations came under severe criticism, see 47 Fed. Reg. 35249, 35250 (1982), and, less than two years after adoption of the interim regulations, HUD enacted proposed regulations designed to return "broad administrative latitude" to the PHA's in setting utility allowances. See *id.*, at 35252. The proposed regulations retained a general standard of "reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment." *Id.*, at 35251. In light of HUD's experience with the interim regulations, however, HUD deemed it "inadvisable" to "attempt to prescribe more restrictively the means by which individual PHAs must realize the general standards for allowances described above." *Id.*, at 35251–35252. HUD also indicated that the mandatory standards in the interim regulations may have been "inconsistent with the general imperative of the United States Housing Act of 1937, to 'vest in local public housing agencies the maximum amount of responsibility in

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stances, wasteful practices, or use of the Utility for tenant-supplied major appliances. The PHA should exclude such cases from consideration in calculating the amount of the allowance.

"(c) Where the available data covers two or more years, averages should be computed and adjustments made, if warranted, by reason of abnormal weather conditions or other changes in circumstances affecting utility consumption.

"(d) The Allowances should then be established at the level which can reasonably be expected to meet the requirements of 90% of the dwelling units in the category." 24 CFR § 865.477 (1981).

the administration of their housing program.'" *Id.*, at 35252.

In 1984, HUD enacted its final utilities regulations, which follow the approach of the proposed regulations and replace the more specific requirements of the interim regulations with a "reasonable utilities" standard. In establishing allowances, PHA's should consider a host of factors such as climatic location; air temperature to be maintained in the dwelling unit; the temperature of domestic hot water measured at the tap; and the physical condition of the housing project. See 24 CFR § 965.476(d) (1986). Apart from these general guidelines, the regulations "ves[t] full responsibility for setting and revising allowances in accordance with the prescribed standards in the [PHA's]." 49 Fed. Reg. 31399, 31400 (1984). Thus, HUD currently chooses to give the PHA's wide discretion in setting utilities allowances; from 1980–1984, it gave the PHA's somewhat less discretion; and from 1969–1980, it left the issue entirely in the hands of the PHA's. The reasons HUD has given for these changes are ministerial, not interpretive. HUD's treatment of utilities since enactment of the Brooke Amendment shows that the agency does *not* view the statute as creating an enforceable right to an ascertainable amount of utilities: the degree to which utilities are fixed by regulation has been a matter of agency discretion, not statutory entitlement.

In the absence of any indication in the language, legislative history, or administrative interpretation of the Brooke Amendment that Congress intended to create an enforceable right to utilities, it is necessary to ask whether administrative regulations *alone* could create such a right. This is a troubling issue not briefed by the parties, and I do not attempt to resolve it here. The Court's questionable reasoning that, because for four years HUD gave somewhat less discretion to the PHA's in setting reasonable utilities allowances, HUD understood Congress to have *required* enforceable utility standards, apparently allows it to sidestep the

question. I am concerned, however, that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result. Thus, HUD's frequently changing views on how best to administer the provision of utilities to public housing tenants becomes the focal point for the creation and extinguishment of federal "rights." Such a result, where determination of § 1983 "rights" has been unleashed from any connection to congressional intent, is troubling indeed.

Even assuming that agency regulations of the sort at issue here could create rights enforceable in a § 1983 action, the temporary regulations involved in this case are not capable of judicial enforcement. The provisions remained subject to the exercise of wide discretion by the local housing authorities, thereby rendering it difficult or impossible to determine whether a violation occurred. Moreover, the regulations were cast as overall standards rather than as a method for determining the utilities rates for particular tenants, making it impossible to fashion appropriate relief for individual plaintiffs. Thus, under the interim regulations PHAs were to establish allowances which could "reasonably be expected" to meet the requirements of "about 90%" of the dwelling units in a particular "dwelling unit category." In making this calculation, the housing authorities were to exclude from consideration cases of "unusual individual circumstances," "wasteful practices," or use of major appliances. Adjustments also could be made, "if warranted," for "abnormal weather conditions or other changes in circumstances affecting utility consumption." See 24 CFR § 865.477 (1981). The housing authorities were to revise their utility allowances if more than 25% of the tenants in a particular dwelling unit category were being surcharged, if there was "no reason of a non-recurring nature (such as weather extremes) to account for this" and if

it was otherwise "appropriate." § 865.480(b). Provisions such as these, which provide no basis for calculating an individual tenant's utility allowance or for providing a remedy if there is a violation, simply defy judicial enforcement.

The Court's only response to the legislative and regulatory history of the utility regulations is to suggest that other actions taken by Congress and HUD show that they were of the view that low-income tenants could resort to federal courts when claiming that a PHA violated the utility regulations. See *ante*, at 424–427, 430, n. 11. That is simply not the case. The three actions by Congress and HUD identified in the Court's opinion are the congressional hearings preceding the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35, § 322, 95 Stat. 400; the 1985 enactment of 42 U. S. C. § 1437d(k) (1982 ed., Supp. III) and HUD's implementing regulations, 24 CFR § 966.50 *et seq.* (1986); and HUD's comments accompanying its final utilities regulations, 49 Fed. Reg. 31399 (1984). The hearings preceding the 1981 Act merely address the effect of that legislation on tenants' general ability to enforce their rights under the Housing Act; they provide no assistance in determining whether those rights include reasonable utilities. As for the enactment of § 1437d(k), HUD has consistently taken the view, as the Court acknowledges, that "the grievance mechanism is not available for challenges to the general utility allowance schedules." *Ante*, at 427, n. 8. HUD's comments in 1986 in connection with proposing new grievance hearing regulations do not suggest that HUD believes low-income tenants have an enforceable right to reasonable utilities:

> "PHA action or non-action concerning general policy issues or class grievances (including determination of the PHA's schedules of allowances for PHA-furnished utilities or of allowances for Tenant-purchased utilities) does not constitute adverse action by the PHA, and the PHA is not required to provide the opportunity for a hearing

to consider such issues or grievances." 51 Fed. Reg. 26528 (1986).

Moreover, HUD's proposed utilities regulations in 1982 stated that a PHA's determination of utilities allowances was subject to review "pursuant to such procedures as may be available under State or local law." 47 Fed. Reg. 35249, 35254. In 1984, responding to comments challenging its "power . . . to divest Federal courts of jurisdiction," 49 Fed. Reg. 31399, 31403, HUD amended the provision to state that PHA allowance determinations are valid unless found to be arbitrary, capricious, an abuse of discretion, "or otherwise not in accordance with law." 24 CFR § 965.473(e) (1986). The agency's explanation for this change was that "the Department's power to preclude access to Federal court is doubtful." 49 Fed. Reg. 31403 (1984). Thus, HUD did not express the view that there is a right to reasonable utilities enforceable in federal courts; it simply recognized that it lacked authority to determine federal jurisdiction. Indeed, the regulations indicate that while it did not have the authority finally to resolve the question, HUD viewed utilities determinations as a matter for state rather than federal courts.

In my view, petitioners do have a remedy in seeking to secure utilities from respondent: they may sue on their leases.[2] Pursuant to its authority to ensure the lower rental character of publicly assisted housing, see 42 U. S. C. §§ 1437c and

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[2] Paragraph 4 of respondent's standard lease provides:

"Utilities: Management Agent agrees to furnish at no charge to the Resident the following utilities as reasonably necessary: hot and cold water, gas for cooking, and electricity for lighting and general household appliances and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the leased unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office." Record, Exh. H.

1437d (1982 ed. and Supp. III), HUD requires PHA's to set forth in their leases that they will "supply running water and reasonable amounts of hot water and reasonable amounts of heat at appropriate times of the year (according to local custom and usage)," 24 CFR § 966.4(e)(7) (1986), and will "maintain in good and safe working order and condition electrical, plumbing, sanitary, heating, ventilating, and other facilities and appliances, including elevators, supplied or required to be supplied by the PHA." § 966.4(e)(5). HUD has developed a standard lease reflecting these requirements, see HUD Circular RHM 7465.8 (Feb. 22, 1971), which respondent's leases closely follow. Thus, respondent is contractually obligated to furnish, "as reasonably necessary," "hot and cold water, gas for cooking, and electricity for lighting and general household appliances and heat at appropriate times of the year, and also range and refrigerator." If respondent fails to fulfill these obligations, petitioners may, like any other tenants, bring suit for breach of contract.

For the reasons given above, however, in my view petitioners do not also have a statutory entitlement enforceable in federal courts by virtue of 42 U. S. C. § 1983. Neither the Brooke Amendment's language, nor its legislative history, nor its interpretation by HUD supports the conclusion that Congress intended to create an entitlement to reasonable utilities when it enacted the statute; and even if agency regulations, standing alone, could create such a right, the temporary regulations relied upon by petitioners in this case are not susceptible of judicial enforcement. On that basis, I believe that the judgment of the Court of Appeals for the Fourth Circuit should be affirmed. Accordingly, I respectfully dissent.

JERSEY SHORE STATE BANK *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-1736. Argued December 8, 1986—Decided January 20, 1987

Section 3505 of the Internal Revenue Code of 1954 (Code) provides that persons such as lenders, who are not employers but who directly or indirectly pay employees' wages, will be personally liable for all or a portion of "a sum equal to" any Social Security and income taxes that are not withheld from the wages and paid to the Government as required by Subtitle C of the Code. Code § 6303(a) requires the Government, within 60 days of making an assessment of unpaid taxes, to notify "each person liable for the unpaid tax" of the amount of the assessment and to make a demand for payment. Without first giving a § 6303(a) notice, the Government brought suit against petitioner in Federal District Court seeking a determination that it was liable under § 3505 for amounts reflecting unpaid taxes required to be withheld from wages paid to employees of a third-party employer. The District Court granted summary judgment for petitioner, holding that a § 6303(a) notice was required. The Court of Appeals reversed.

Held: Section 6303(a) does not require the Government to provide notice and a demand for payment to a lender before bringing a civil suit to collect sums for which the lender is liable under § 3505. Pp. 446–449.

(a) Section 6303(a)'s description of an assessment notice recipient as a person "liable for the unpaid tax" does not clearly include a § 3505 third-party lender, who is liable for all or part of "a sum equal to" the unpaid taxes. P. 446.

(b) Compliance with § 6303(a)'s requirements that the notice "stat[e] the amount" assessed and "deman[d] payment thereof" would frequently have little meaning to lenders in § 3505 cases, since the amount stated and demanded (1) could include the employer's share of unpaid Social Security taxes, for which the lender is not liable; (2) could equal the lender's liability only if the lender provided payroll financing throughout the period covered by the assessment; and (3) would rarely be accurate for a lender liable only under § 3505(b), which limits exposure to 25% of the funds loaned to the employer. Pp. 446–447.

(c) It would not be fundamentally unfair to require the Government to provide § 6303(a) notice to delinquent employers but not to lenders in § 3505 cases, since employers, who are subject to summary collection procedures soon after unpaid employment taxes are assessed, have a far

greater need for such a notice than third-party lenders, upon whom liability can be imposed only after a civil suit. Pp. 447–448.

(d) A third-party lender would not be unfairly prejudiced by lack of a § 6303(a) notice even if, as contended by petitioner, a timely assessment under § 6501(a) would trigger an additional 6-year limitation period under § 6502(a)(1) for a collection suit against the lender, since, as § 3505's legislative history suggests, Congress envisioned a system in which third-party lenders would take their potential § 3505 liability into consideration by including the amount of potential withholding liability in their loans and taking adequate security, and since, even without a § 6303(a) notice, a prudent lender may be alerted to its § 3505 liability at the time it engages in "net payroll financing," *e. g.*, providing funds to the employer for wages but not for withholding taxes. Pp. 448–449.

781 F. 2d 974, affirmed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Martin A. Flayhart argued the cause and filed briefs for petitioner.

Alan I. Horowitz argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Olsen, Deputy Solicitor General Lauber, Wynette J. Hewett,* and *Bruce R. Ellisen.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Subtitle C of the Internal Revenue Code of 1954, 26 U. S. C. § 3101 *et seq.* (Code), imposes a number of employment taxes, among which are the income tax withheld from an employee's wages and the Social Security tax. The Code divides the burden of the Social Security tax between the employer and the employee, but imposes the income tax on the employee alone. The employer has responsibility, however, for both paying its share of the Social Security tax and withholding from the employee's wages the income tax and the

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*Briefs of *amici curiae* urging reversal were filed for First Alabama Bank by *Brock B. Gordon* and *Alan C. Christian;* and for the American Bankers Association by *John J. Gill III* and *Michael F. Crotty.*

employee's share of the Social Security tax. If the employer fails to pay over the withheld Social Security and income taxes to the Government, the employer is liable for their payment. Within 60 days of making an assessment of unpaid taxes against an employer, the Government is required, under § 6303(a) of the Code, to provide the employer with notice of the assessment and demand for payment. In some instances, a person other than the employer, such as a lender, may directly or indirectly pay the employee's wages. Section 3505 of the Code provides that such a person may be personally liable if the employee's Social Security and income taxes are not withheld and paid to the Government. This case presents the question whether § 6303(a) requires the Government to provide notice and demand for payment to a lender before bringing a civil suit against the lender to collect sums for which it is liable under § 3505. We hold that it does not.

The United States brought the present action against Jersey Shore State Bank in the United States District Court for the Middle District of Pennsylvania, seeking a determination that Jersey Shore was personally liable under § 3505 for amounts reflecting unpaid taxes required to be withheld from the wages of the employees of Pennmount Industries. The Government claimed that Jersey Shore paid wages directly to Pennmount employees during the fourth quarter of 1977 through the first quarter of 1980, thereby making it liable under § 3505(a) for a sum equal to the full amount of the unpaid withholding taxes for that period.[1] In the alternative, the complaint alleged that, for the same period, Jersey Shore supplied funds to Pennmount for the wages of Penn-

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[1] Section 3505(a) provides, in pertinent part:

"[I]f a lender, surety, or other person, who is not an employer . . . with respect to an employee, . . . pays wages directly to such an employee . . . , such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) required to be deducted and withheld . . . ."

mount employees "with actual notice and knowledge" that Pennmount "did not intend or would not be able to make timely payment or desposits *[sic]* of the . . . taxes required to be deducted and withheld" from the wages. App. to Pet. for Cert. 40a–41a. Based on this latter allegation, the Government asserted that Jersey Shore was liable under § 3505(b) for 25 percent of the amount of funds supplied to Pennmount.[2]

The District Court granted summary judgment in favor of Jersey Shore, holding that § 6303(a)[3] requires the Government to send notice of an assessment against an employer to a third-party lender liable under § 3505. 628 F. Supp. 15 (MD Pa. 1985). Because the United States conceded that it had not provided Jersey Shore with notice of the assessments against Pennmount pursuant to § 6303(a), the court concluded that the suit against Jersey Shore was barred. The Court of Appeals for the Third Circuit reversed. 781 F. 2d 974 (1986).[4] We granted certiorari to resolve the intercircuit

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[2] Section 3505(b) provides, in pertinent part:

"If a lender, surety, or other person supplies funds to . . . an employer for the specific purpose of paying wages of the employees of such employer, with actual notice or knowledge . . . that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax required . . . to be deducted and withheld by such employer . . . , such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) which are not paid over to the United States by such employer. However, . . . the liability of such lender, surety, or other person shall be limited to an amount equal to 25 percent of the amount so supplied to . . . such employer for such purpose."

[3] Section 6303(a) provides, in pertinent part:

"Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof."

[4] One judge dissented from the majority opinion, arguing that the plain language of § 6303(a) required that the Government provide notice to the lender.

conflict over the issue decided by the Court of Appeals.[5] 476 U. S. 1157 (1986). We now affirm.

Section 6303(a) requires notice of an assessment to "each person liable for the unpaid tax." According to Jersey Shore, this phrase clearly describes a third-party lender liable under § 3505 for unpaid withholding taxes assessed against an employer. The relationship between § 3505 and § 6303(a), however, is not as clear as Jersey Shore maintains. Section 3505 does not declare that a lender is "liable for the unpaid tax." Instead, the section imposes liability on the lender for all or part of "a sum equal to the taxes." §§ 3505(a),(b).

Other portions of the text of § 6303(a) further demonstrate a lack of connection between that section and § 3505. Section 6303(a) not only provides that the Government shall give notice of an assessment "to each person liable for the unpaid tax," but it also requires notice "stating the amount" assessed and "demanding payment thereof." § 6303(a). Notice complying with these latter two requirements may have little meaning for a third-party lender. In the first place, the assessment against the employer may include the employer's share of unpaid Social Security taxes for which the lender is not liable. See § 3505; H. R. Rep. No. 1884, 89th Cong., 2d Sess., 21 (1966) (a lender "is not liable for the

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[5] In addition to the Court of Appeals for the Third Circuit, four other Circuits have addressed whether the Government must provide § 6303(a) notice to third parties liable under § 3505. See *United States* v. *Messina Builders & Contractors Co.*, 801 F. 2d 1029 (CA8 1986) (§ 6303(a) notice required), cert. pending, No. 86–1007; *United States* v. *Hunter Engineers & Constructors, Inc.*, 789 F. 2d 1436 (CA9 1986) (§ 6303(a) notice not required), cert. pending, No. 86–209; *United States* v. *Merchants National Bank of Mobile*, 772 F. 2d 1522 (CA11 1985) (§ 6303(a) notice required), cert. pending, No. 85–1480; *United States* v. *Associates Commercial Corp.*, 721 F. 2d 1094 (CA7 1983) (§ 6303(a) notice required); see also *United States* v. *Friedman*, 739 F. 2d 252 (CA7 1984) (failure to provide notice within 60 days of assessment will not bar suit where Government has provided notice before assessment to person liable under § 3505).

employer's portion of payroll taxes"); S. Rep. No. 1708, 89th Cong., 2d Sess., 23 (1966) (same). Even where the assessment does not include such taxes, the lender's liability could equal the amount stated in the notice only if the lender provided payroll financing throughout the time period reflected in the assessment. Moreover, the chances are slim that the notice amount would be accurate for lenders liable only under § 3505(b), which limits a lender's exposure to 25 percent of the funds supplied to the employer. Accordingly, if sent to a lender, the notice required under § 6303(a) is likely to demand payment of an amount different from that for which the lender is liable. We find it improbable that Congress intended such a result. Reading the two sections together, we agree with the Court of Appeals that § 6303(a) is most logically read not to apply where the Government seeks to collect from a lender under § 3505.

In arguing to the contrary, Jersey Shore urges that it would be fundamentally unfair not to require the Government to provide lenders with § 6303(a) notice. Jersey Shore first maintains that, because employers and lenders are similarly situated under the Code, the procedural requirements applicable to employers also must be accorded to lenders. But even assuming that § 6303(a) notice would provide lenders with meaningful information, we are unpersuaded by this contention. Under the collection mechanisms established by the Code, employers and lenders are in very different positions. While employers are subject to the Government's summary collection procedures soon after unpaid employment taxes are assessed, see, *e. g.*, §§ 6321, 6322, 6331, 6335, the legislative history of § 3505 makes clear that the Government may forcibly collect against a lender only by filing a civil suit. See H. R. Rep. No. 1884, 89th Cong., 2d Sess., 66 (1966) (where a third-party does not voluntarily satisfy the liability imposed by § 3505, "the United States may collect such liability by appropriate civil proceeding"). An employer therefore has a far greater need for an assessment

notice than third-party lenders, who are not subject to summary collection procedures.

We also reject Jersey Shore's related contention that a third-party lender is unfairly prejudiced by lack of an assessment notice because of the effect of an assessment on the statute of limitations for collection suits. Under the general rule set forth in § 6501(a), "the amount of any tax imposed . . . shall be assessed within 3 years after the return was filed . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period." Nevertheless, where a proper assessment has been made, the unpaid tax generally "may be collected by levy or by a proceeding in court . . . begun . . . within 6 years after the assessment." § 6502(a)(1). Under Jersey Shore's reading of these provisions, the Government enjoys an additional 6-year limitations period for collecting against a lender if it makes an assessment against the employer within three years after the corresponding employment tax return is filed. Jersey Shore submits that Congress could not have intended the Government to benefit from this longer statute of limitations when it seeks to collect against a lender without also requiring the Government to provide the lender with notice of the assessment against the employer.

Assuming, without deciding, that Jersey Shore's reading of the statute of limitations provisions is correct, we are not convinced that they render our construction of § 6303(a) implausible. A lender is not liable under § 3505 unless it either "pays wages directly" to an employee or supplies funds for the wages with "actual notice or knowledge" that the employer is either unable to make timely payment of the required withholding taxes or has no intention of doing so. The lender is deemed to have such actual notice or knowledge from the time the lender, in the exercise of due diligence, would have been aware that the employer would not or could not make timely payment. § 6323(i)(1). Accordingly, a prudent lender could be alerted to its liability under § 3505 at the

time it engaged in what the Government describes as "net payroll financing," a practice whereby the lender provides funds for payment of employees' net wages, but not funds for payment of withholding taxes. Thus, even without § 6303(a) notice, such a lender could take steps to protect itself against the possibility of a future § 3505 suit. The Committee Reports concerning § 3505 demonstrate that Congress considered precautions third parties could take to protect themselves:

> "[S]ureties can protect themselves against any losses attributable to withholding taxes by including this risk of liability in establishing their premiums, and lenders by including the amounts in their loans and taking adequate security." S. Rep. No. 1708, 89th Cong., 2d Sess., 23 (1966); H. R. Rep. No. 1884, 89th Cong., 2d Sess., 22 (1966).[6]

As the Court of Appeals recognized, this passage suggests that "Congress envisioned a system in which third parties would take their potential liability under section 3505 into consideration at the time they entered into the transaction exposing them to liability under the statute." 781 F. 2d, at 982.

For the foregoing reasons, we conclude that Congress did not intend to require the Government to provide a lender with notice under § 6303(a) before bringing a civil suit to collect under § 3505. The judgment of the Court of Appeals for the Third Circuit is therefore

Affirmed.

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[6] Jersey Shore argues that this passage does not relate to § 3505, but instead refers only to an amendment to the Miller Act concerning the requirements for performance bonds on public works. It is true that the passage appears in each Committee Report under subheadings referencing the Miller Act. In both Reports, however, the passage immediately follows a discussion of lenders, sureties, and other persons liable under § 3505 and is prefaced with the phrase "[i]n the cases discussed above." Thus, the context of the passage makes clear that it relates to § 3505.

INTERSTATE COMMERCE COMMISSION *v.* TEXAS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85–1222. Argued December 10, 1986—Decided January 20, 1987*

Since the 1930's, railroads, motor carriers, and freight forwarders have offered both trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) services, forms of mixed train and truck transportation whereby loaded truck trailers or containers to be placed on truck trailers are transported on railroad flatcars and then hauled by trucks on the highways. A provision of the Staggers Rail Act of 1980, 49 U. S. C. § 10505(f), authorizes the Interstate Commerce Commission (ICC) to exempt from state regulation "transportation that is provided by a rail carrier as a part of a continuous intermodal movement." In 1981, the ICC adopted a regulation exempting from state regulation, and covering both the motor and rail portions of, "Plan II TOFC/COFC service," which involves door-to-door service by a railroad that moves its own trailers or containers on flatcars. In 1982, petitioner railroad companies petitioned the Texas Railroad Commission to apply the ICC's exemption to Texas intrastate TOFC/COFC traffic. The State Commission granted a partial exemption covering the rail portion but not the truck portion of intrastate Plan II service. The railroad companies then petitioned for review of that decision by the ICC, which held that the State Commission's assertion of regulatory jurisdiction over the truck portion of Plan II service was inconsistent with the ICC's 1981 regulation. On review of the ICC's order, the Court of Appeals reversed, holding that the truck portion of the intrastate movements at issue was not "transportation . . . provided by a rail carrier" within the meaning of § 10505(f) but rather was "transportation provided by a motor carrier" within the meaning of 49 U. S. C. § 10521(b)(1), which reserves such intrastate transportation for state regulation.

Held: The grant of authority to the ICC under § 10505(f) encompasses the motor freight portion of a Plan II shipment entirely within the State. Since all of the elements of the Plan II service at issue are provided on equipment owned and operated by a rail carrier over which the ICC has jurisdiction, the plain language of § 10505(f) unambiguously supports

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*Together with No. 85–1267, *Missouri-Kansas-Texas Railroad Co. et al.* v. *Texas et al.*, also on certiorari to the same court.

the ICC's position. Although § 10521(b)(1) can be read to support a contrary result, the correct, and more natural, reading of the statute is that all of the Plan II service provided by interstate rail carriers on equipment that they own is "transportation provided by a rail carrier" subject to the ICC's § 10505(f) jurisdiction. A contrary result would be inconsistent with the ICC's historical treatment of Plan II service as "provided by a railroad," and would make § 10521(b)(1) authorize state regulation of TOFC/COFC services in areas where it has already been rejected. Moreover, the ICC's special statutory authority to determine the proper interrelationship of different modes of transportation supports its interpretation of the Staggers Rail Act. In its statement of rail transportation policy, Congress has unambiguously expressed its interest in allowing free competition, to the maximum extent possible, to govern the financial health of the railroad industry. Pp. 455–461.

770 F. 2d 452, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Richard G. Taranto argued the cause for petitioner in No. 85–1222. With him on the briefs were *Solicitor General Fried, Deputy Solicitor General Cohen, Robert H. Klonoff, Robert S. Burk, Henri F. Rush,* and *H. Glenn Scammel. Michael E. Roper* argued the cause for petitioners in No. 85–1267. With him on the briefs were *Robert B. Batchelder* and *Hugh L. McCulley.*

Fernando Rodriguez, Assistant Attorney General of Texas, argued the cause for respondents. With him on the brief were *Mary F. Keller,* Executive Assistant Attorney General, *Larry J. Laurent,* Special Assistant Attorney General, and *Douglas Fraser,* Assistant Attorney General.

JUSTICE STEVENS delivered the opinion of the Court.

Trailer-on-flatcar (TOFC or "piggyback") service, a form of mixed train and truck transportation, enables a carrier to transport a trailer and its contents over rail on a flatcar and then to haul the trailer on the highway. The goods need not be unloaded and reloaded when they move from the rail mode to the truck mode; the shipment remains within the trailer or container during the entire journey. Various forms of

TOFC and container-on-flatcar (COFC)[1] service have been offered to the public by railroads, motor carriers, and freight forwarders since the 1930's.[2] These cases concern the extent of the State of Texas' jurisdiction over what is known as "Plan II TOFC/COFC service," which has long been defined as follows:

> "Plan II (All-Rail):
>
> "Door-to-door service performed by the railroad, which moves its own trailers or containers on flatcars under open tariffs usually similar to those of truckers." See *American Trucking Assns., Inc.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S. 397, 403 (1967).

The ICC's statutory authority includes jurisdiction to grant exemptions from regulation as well as to regulate. In 1980, Congress enacted the Staggers Rail Act, 94 Stat. 1895, 49 U. S. C. § 10101 *et seq.*, which authorizes the ICC to exempt from state regulation "transportation that is provided by a rail carrier as a part of a continuous intermodal movement." See § 10505(f). It is undisputed that the ICC may grant an exemption from regulation to interstate TOFC/COFC transportation provided by a rail carrier. The ques-

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[1] The petitions for certiorari include both TOFC and COFC service. Pet. for Cert. in No. 85–1222, p. I; Pet. for Cert. in No. 85–1267, p. i. A container, unlike a trailer, cannot itself be hauled on the highway by a tractor rig; it must first be placed on a suitable truck trailer. For the purposes of this opinion, however, there are no relevant differences between TOFC and COFC service.

"TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation: the railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speed; and the motor carrier's ability to provide door-to-door, and if necessary job- or farm-site, pickup and delivery." *Ex parte No. 230, Substituted Service-Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I. C. C. 301, 329 (1964).

[2] See generally *id.*, at 305–309 (describing growth of TOFC service).

tion presented is whether the grant of authority to the ICC under § 10505(f) encompasses the motor freight portion of a Plan II TOFC/COFC shipment entirely within the State of Texas.

I

In 1981, the Commission adopted a regulation exempting Plan II service from state regulation.[3] The regulation unambiguously covers both the motor portion and the rail portion of Plan II service.[4] In a separate case involving interstate Plan II shipments, the Court of Appeals for the Fifth Circuit upheld the regulation, specifically rejecting an argument that the Commission had no authority to exempt the motor portion of the intermodal service. It held that "rail-owned truck TOFC/COFC service is 'transportation that is provided by a rail carrier.'" *American Trucking Assns., Inc.* v. *ICC*, 656 F. 2d 1115, 1120 (1981).

On September 27, 1982, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, and Southern Pacific Transportation Company (Railroads) petitioned the Railroad Commission of Texas (RCT) to apply the ICC's exemption to their Texas intrastate TOFC/COFC traffic. App. 7–10. The RCT took the position that it retained the authority to regulate the motor carrier segment of intrastate transportation provided by an interstate rail carrier. The Staggers Rail Act provides that a state commission may regulate intrastate transportation provided by a rail carrier, but

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[3] See 49 CFR § 1039.13 (1986). See also *Improvement of TOFC/COFC Regulation*, 364 I. C. C. 731, aff'd, *American Trucking Assns., Inc.* v. *ICC*, 656 F. 2d 1115 (CA5 1981).

[4] The exemption encompasses "[r]ailroad and truck transportation *provided by a rail carrier* as part of a continuous intermodal movement." 49 CFR § 1039.13 (1986) (emphasis added). In some plans, the motor portion of an intermodal movement is performed by a trucking company, freight forwarder, or shipper. See *American Trucking Assns., Inc.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S. 397, 403 (1967). In such plans, the exemption applies only to the rail portion of the intermodal service.

only to the extent that it conforms with the federal Act and only if the ICC determines that the State's proposed regulatory standards and procedures are consistent with federal standards and procedures.[5] The RCT granted a partial exemption which covered the rail but not the pre-rail and post-ex-rail truck service portions of the intrastate TOFC/COFC service. *Id.*, at 11–12.

The Railroads petitioned the ICC under 49 U. S. C. § 11501(c) to review the RCT's decision and to grant the full TOFC/COFC exemption. The ICC held that the State Commission's assertion of regulatory jurisdiction over "incidental pre-rail and ex-rail over-the-road movements" of Plan II TOFC/COFC service was inconsistent with the federal standards contained in its 1981 regulation.[6] The State of Texas sought review of the ICC's order in the Court of Appeals for the Fifth Circuit. The Railroads intervened as respondents. That court reversed, holding that the truck portion of the intrastate movements at issue was not "transportation . . . provided by a rail carrier" within the meaning of § 10505(f)[7]

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[5] See 49 U. S. C. § 11501. At the time it issued the decision at issue in this case, the Railroad Commission of Texas had provisional certification to regulate intrastate transportation provided by a rail carrier. The Commission no longer has this statutory authority to regulate intrastate rail rates, classification, rules, and practices of interstate carriers because it was denied certification by the ICC in *Ex parte No. 388 (Sub-No. 31), State Intrastate Rail Rate Authority—Texas*, 1 I. C. C. 2d 26 (1984), aff'd, *Railroad Comm'n of Texas* v. *United States*, 246 U. S. App. D. C. 352, 765 F. 2d 221 (1985).

[6] See ICC No. 39627, Petition Under 49 U. S. C. 11501(c) by Missouri-Kansas-Texas Railroad Company, et al., for Review of an Order of the Railroad Commission of Texas, decided Jan. 19, 1984 (Service Date Jan. 23, 1984); ICC, No. 39704, Petition of Road-Rail Transportation Company, Inc., Under 49 U. S. C. 11501(c) for Review of an Order of the Railroad Commission of Texas, decided Apr. 11, 1984 (Service Date Apr. 13, 1984).

[7] Section 10505(f) provides:

"The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement."

but rather was "transportation provided by a motor carrier" within the meaning of § 10521(b)(1).[8] *Texas* v. *United States*, 770 F. 2d 452 (1985). The Court of Appeals distinguished *American Trucking Assns., Inc.* v. *ICC*, *supra*, as limited to TOFC/COFC shipments that at some point in their journey crossed a state boundary. When the service is purely intrastate, the Court of Appeals held, the motor portions of TOFC/COFC service by railroad-owned trucks constitute transportation provided by a motor carrier under § 10521(b)(1) and for that reason are expressly reserved for state regulation. We granted the petitions for certiorari of the ICC and the Railroads, 476 U. S. 1157 (1986). We are persuaded that the Court of Appeals erred.

II

It is undisputed that the Commission's power to grant these exemptions from state regulation is coextensive with its own authority to regulate, or not to regulate, these intermodal movements by rail carriers.[9] We therefore focus our

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[8] Section 10521(b)(1) provides:

"(b) This subtitle does not—

"(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier."

Sections 10922, 10935, and 11501(e) are not relevant to the issue.

[9] The ICC found that the Railroad Commission of Texas' refusal to apply the entire TOFC/COFC exemption violated federal standards and procedures binding upon the State Commission, and authorized the Railroads "to establish any rate, classification, rule, or practice pertaining to intrastate rail or motor transportation provided by a rail carrier as part of a continuous intermodal movement within the State of Texas, to the same extent and in the same manner that they establish rates, classifications, rules, or practices for similar interstate movements." App. to Pet. for Cert. in No. 85–1222, pp. 21a–22a. The Court of Appeals stated:

"The thrust of the argument of the State of Texas is that the I. C. C. lacks jurisdiction over the trucking segment of the totally intrastate TOFC activities of the *intrastate [sic]* rail carriers. Without this jurisdiction,

review on the extent of the Commission's jurisdiction over the trucking segment of intrastate TOFC/COFC activities. Since all of the railroads interested in this proceeding are engaged in interstate commerce, the Commission has authority over the intrastate transportation, as well as the interstate transportation, provided by such carriers.[10] All of the elements of the Plan II TOFC/COFC service at issue are provided on equipment owned and operated by a rail carrier over which the ICC has jurisdiction. Thus, the plain language of § 10505(f) unambiguously supports the ICC's position.[11]

It is true, of course, that the text of § 10521(b)(1) can be read to support the contrary result because it is possible to

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Texas maintains, the I. C. C. could not exempt the intrastate highway transportation from state regulation. We are constrained to agree." *Texas* v. *United States*, 770 F. 2d 452, 453 (CA5 1985) (emphasis added).

This quotation reveals an incompleteness in the Court of Appeals' reasoning. If the rail carriers were "*intrastate* rail carriers," the ICC would not have had jurisdiction over either the rail or the motor portion of their intrastate movements. But this conclusion does not necessarily extend to the rail and motor portions of intrastate movements by all other rail carriers, specifically those that operate across state boundaries. In fact, the Railroads in this proceeding are all *interstate* rail carriers, and the ICC has consistently exercised jurisdiction over their intrastate, as well as their interstate, movements. See n. 14, *infra*. Nevertheless, the Court of Appeals did not err in its underlying conclusion that the ICC's authority to grant an exemption from federal regulation coincides with its authority to grant an exemption from state regulation. In its argument in this case, the State of Texas also recognizes that the scope of the ICC's authority over exemptions from state regulation is coextensive with its own jurisdiction either to impose federal regulation or to grant an exemption from federal regulation. Thus, although this case involves the ICC's effort to grant exemptions from regulation, the same legal question would be presented if the ICC were trying to regulate the rates for an interstate rail carrier's intrastate movements, and the carrier asserted that only the state commission had such power.

[10] See 49 U. S. C. §§ 10501 and 11501. The Commission does not assert jurisdiction over wholly intrastate carriers; nor does it assert the authority to exempt such carriers from state regulation.

[11] See n. 7, *supra*.

regard the rail carrier as a "motor carrier" during the truck portion of the intermodal movement. We believe, however, that the correct, and certainly the more natural, reading of the statute is that all of the TOFC/COFC service provided by interstate rail carriers on equipment which they own is "transportation provided by a rail carrier" subject to the jurisdiction of the ICC.[12]

The position urged by respondents encounters three serious difficulties. First, it is inconsistent with the agency's historical treatment of Plan II TOFC/COFC service as "provided by a railroad." In *Ex parte 230, Substituted Service-Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I. C. C. 301, 304–305, 309–312 (1964), the Commission stated:

> "Under plan II, the railroad holds out to provide a complete door-to-door service under a single bill of lading. Neither the shipper nor the consignee intervenes in any way in the overall transportation activities or does anything beyond tendering the shipment to the railroad at origin or at the shipper's loading dock." *Id.*, at 311.

The Commission recognized that the distinctive element of Plan II service was not the use of trailers or containers to offer door-to-door pickup and delivery service via rail and

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[12] Our holding that the ICC's jurisdiction under § 10505(f) includes the intrastate portions of Plan II TOFC/COFC service applies whether or not a State has been certified under 49 U. S. C. § 11501. Because the Railroad Commission of Texas is not now certified to regulate railroads, the statute independently places the truck portion of intra-Texas TOFC/COFC service within the jurisdiction of the ICC:

"Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under [§ 10501 *et seq.*]." 49 U. S. C. § 11501(b)(4)(B).

highway, but rather the identity of the carrier offering this service:

> "[A]ll three—rail carrier, motor carrier, and freight forwarder—are even today providing, through the use of piggyback, services which in physical characteristics are substantially similar. Any one of the three can offer a transportation service which includes door-to-door pickup and delivery, movement of loaded trailers between a shipper's premises and a rail yard, and line-haul transportation of the loaded trailers by rail. The railroad does this under its plan II TOFC tariff; the trucker does it under plan I, in which it is encouraged by the railroads . . . and the freight forwarder does it through use of plans III and IV rail tariffs." *Id.*, at 330.

In none of the plans was a rail carrier treated either as a hybrid, or as a motor carrier, during the truck segment of the intermodal movement. Presumably, in enacting § 10505, Congress was aware of the Commission's consistent practice of regulating railroads as "rail carriers" even when they performed Plan II intermodal service.

Second, the State's interpretation of § 10521(b)(1) would make that section authorize state regulation of TOFC/COFC services in areas where it has already been rejected. The term "intrastate transportation provided by a motor carrier" must refer either to the intrastate motor portion of any TOFC/COFC movement or to the entire intrastate movement when a portion of it is performed by truck service. If the term refers only to the motor portion, the State's reading of the statute would preserve the State's power to regulate the intrastate motor portion of an interstate Plan II TOFC/COFC shipment. But Texas acknowledges that it has no such power.[13] Alternatively, if the term refers to every in-

[13] And of course the Fifth Circuit so held in *American Trucking Assns., Inc.* v. *ICC*, 656 F. 2d 1115 (1981). The reason why Texas does not have that power is that the statute plainly authorized the ICC either to regulate, or to exempt from regulation, such continuous interstate movements. We think it clear that the ICC's authority over intrastate rail transportation

trastate shipment that includes a motor segment, the railroad must be regarded as a "motor carrier" even during the rail portion of the intermodal movement, and the RCT would retain the power to regulate the entire intrastate movement. Again, Texas does not claim that authority. We think it clear that the only way to square the words of the statute with those aspects of the ICC's jurisdiction that the State does accept is to hold that the ICC's authority over intrastate transportation provided by an interstate rail carrier encompasses the entire movement, even when it includes a truck segment under Plan II.[14]

Third, the special statutory authority of the Commission to determine the proper interrelationship of different modes

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by an interstate rail carrier encompasses the entire movement, even when it includes a truck segment. This conclusion was at least implicit in the Fifth Circuit's opinion in *American Trucking Assns., Inc.* v. *ICC*, *supra*, at 1120:

"[R]ail-owned truck TOFC/COFC service is 'transportation that is provided by a rail carrier.' Had Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language. Instead, it chose the broad 'transportation-that-is-provided-by-a-rail-carrier' language and presumably did so with knowledge that it previously had defined 'transportation' to include the movement of passengers or property by motor vehicle." (Citations omitted; footnotes omitted.)

[14] The Court of Appeals based its conclusion that "transportation provided by a rail carrier" should be defined more narrowly for intrastate traffic than for interstate commerce on the "potential mischief" of exempting intrastate rail travel from regulation. The Court of Appeals focused on the hypothetical example of a small intrastate rail carrier that provides minimal rail service within a city and extensive truck service to convey goods to and from the city, and is exempt from state regulation. See 770 F. 2d, at 454–455. This scenario could only occur, however, if the ICC had authority to exempt such transportation from regulation. But because the hypothetical railroad is only an *intrastate* carrier, the ICC would not have any jurisdiction over it, and the speculative potential for mischief would not exist. In this case, by contrast, the Railroads are interstate carriers whose TOFC/COFC services include some segments entirely within Texas. See Guide to Piggyback Routes, Distribution 190, 196 (July 1982) (route diagrams for TOFC/COFC service). See also n. 9, *supra*.

of transportation supports its interpretation of the Staggers Rail Act.[15] The statute was a response to the concern that differing state and federal standards applying to the industry and excessive governmental regulation by both federal and state authorities had contributed to the financial difficulties of major railroads.[16] In its statement of rail transportation policy, Congress unambiguously expressed its interest in allowing free competition, to the maximum extent possible, to govern the financial health of the railroad industry.[17] The importance of that policy is confirmed by the fact that the

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[15] "[W]e cannot accept arguments based upon arguable inference from nonspecific statutory language, limiting the Commission's power to adopt rules which, essentially, reflect its judgment in light of current facts as to the proper interrelationship of several modes of transportation with respect to an important new development." *American Trucking Assns., Inc.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S., at 410. The reading of the Act proposed by respondents impermissibly limits the ICC's power to implement national transportation policy in the evolving area of intermodal transportation.

[16] See H. R. Rep. No. 96–1035, pp. 38, 61, 128–130 (1980); H. R. Conf. Rep. No. 96–1430, p. 79 (1980).

[17] Section 10101a "establishes a specific rail transportation policy to guide the Commission in its duties in regulation of the railroad industry." H. R. Conf. Rep. No. 96–1430, *supra*, at 80. Section 10101a provides, in part:

"10101a. Rail transportation policy

"In regulating the railroad industry, it is the policy of the United States Government—

"(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

. . . . . .

"(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

"(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

. . . . . .

"(7) to reduce regulatory barriers to entry into and exit from the industry."

statement of general transportation policy applicable to all types of carriers, which generally prescribes the impartial regulation of all competing modes of transportation, is introduced by an exception providing that the special policy statement endorsing competition in railroad transportation shall prevail when transportation policy has an impact on rail carriers.[18] Even if the question of the extent to which § 10521(b)(1) restricts the Commission's power under § 10505 in these cases were in doubt, the statutory statement of policy priorities would lead us to agree with the ICC's view that the ambiguity should be resolved in favor of competition, rather than partial state regulation of Plan II TOFC/COFC service.

The judgment of the Court of Appeals is reversed.

It is so ordered.

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[18] Section 10101 provides in part:

"(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation . . . ."

CITY OF PLEASANT GROVE *v.* UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 85–1244. Argued December 10, 1986—Decided January 21, 1987

Appellant, an Alabama city that has a long history of racial discrimination and that until recently had an all-white population, is covered by § 5 of the Voting Rights Act of 1965 (Act) and accordingly must seek preclearance before instituting any change in a standard, practice, or procedure affecting voting. Appellant sought approval by the Attorney General for the annexation of two parcels of land, one vacant (hereinafter called the Western Addition) and the other (Glasgow Addition) added at the request of its inhabitants, an extended white family who wished their children to attend appellant's then all-white school system. The Attorney General objected to the annexations, finding with respect to the Western Addition that appellant's refusal to annex an adjacent black neighborhood (Highlands) was indicative of an intent to annex only white areas. Pursuant to § 5 of the Act, appellant then filed this declaratory action in the United States District Court for the District of Columbia, which denied relief, finding that the Western Addition's location and appellant's plans for relatively expensive housing there indicated that it was likely to be developed for use by white persons only. The court further found that appellant failed to carry its burden of proving that the annexations at issue did not have the purpose of abridging or denying the right to vote on account of race.

Held:

1. Fundamental principles of the Act, governing this case, are that an annexation of inhabited land constitutes a change in voting practice or procedure subject to preclearance under § 5, and even the annexation of vacant land on which residential development is anticipated must be precleared before those moving into the area may vote in the annexing jurisdiction. Moreover, Congress intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent, and the burden of proving absence of discriminatory purpose and effect is on the covered jurisdiction. Pp. 467–469.

2. There is no merit to appellant's contention that the District Court erred in concluding that appellant had not carried its burden of showing that the annexations were untainted by a racially discriminatory purpose. In arriving at its decision, the District Court relied on a variety of evidence, principally its finding that the refusal to annex the Highlands

while annexing other areas was racially motivated rather than, as appellant asserted, based upon economic considerations. The court's findings, both as to the purpose of not annexing the Highlands and with respect to the weight of the evidence regarding the purpose of the two annexations at issue, are findings of fact that must be accepted unless clearly erroneous, and appellant has not established that they are clearly erroneous. Appellant's argument that even if its decision not to annex the Highlands was racially motivated, such decision was not a change respecting voting and hence was not subject to § 5 is correct, but not dispositive. The failure to annex black areas while simultaneously annexing nonblack areas is highly significant in demonstrating that appellant's annexations were purposefully designed to perpetuate it as an enlarged enclave of white voters. Moreover, the contention that since appellant had no black voters at the time of the annexations they could not have caused an impermissible effect on black voting and thus it cannot be concluded that appellant had a discriminatory purpose, is based on the incorrect assumption that an impermissible purpose under § 5 can relate only to present circumstances. Section 5 looks not only to the present effects of changes, but to their future effects as well, and, likewise, an impermissible purpose under § 5 may relate to anticipated as well as present circumstances. Pp. 469–472.

623 F. Supp. 782, affirmed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, and SCALIA, JJ., joined. POWELL, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 472.

Thomas G. Corcoran, Jr., argued the cause for appellant. With him on the briefs were *Donald J. Cronin* and *Thomas N. Crawford, Jr.*

Jerrold J. Ganzfried argued the cause for the United States. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Ayer*, and *Walter W. Barnett.**

**Daniel J. Popeo* and *George C. Smith* filed a brief for the Washington Legal Foundation as *amicus curiae* urging reversal.

David Boies, *Stephen D. Poss*, *Joaquin Avila*, and *Armand Derfner* filed a brief for the Democratic National Committee as *amicus curiae* urging affirmance.

JUSTICE WHITE delivered the opinion of the Court.

Appellant, Pleasant Grove, a city in Alabama that until recently had an all-white population, is covered by § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, and accordingly must seek preclearance before instituting any change in a standard, practice, or procedure affecting voting.[1] Appellant unsuccessfully sought preclearance by the Attorney General for the annexation of two parcels of land, one vacant and the other inhabited by a few whites. Appellant also failed to convince a three-judge District Court that the annexations did not have the purpose of abridging or denying the right to vote on account of race. We noted probable jurisdiction, 476 U. S. 1113 (1986), and now affirm.

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[1] Section 5, as set forth in 42 U. S. C. § 1973c, provides in relevant part: "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, . . . and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made."

It is undisputed that appellant, being a subdivision of the State of Alabama, is covered by § 5. See 30 Fed. Reg. 9897 (1965).

I

Appellant, whose population numbers approximately 7,000, was described by the District Court as "an all-white enclave in an otherwise racially mixed area of Alabama."[2] 568 F. Supp. 1455, 1456 (DC 1983). The city has a long history of racial discrimination. The District Court's opinions chronicle the city's past discriminatory practices in some detail, and we will not repeat that history fully here. See 623 F. Supp. 782, 787–788 (DC 1985); 568 F. Supp., at 1456–1457. Suffice it to say that in housing, zoning, hiring, and school policies appellant's officials have shown unambiguous opposition to racial integration, both before and after the passage of the federal civil rights laws.

The two annexations at issue in this case are the Glasgow Addition, a 40-acre parcel added in 1969, App. 7, and the Western Addition, a 450-acre area added in 1979. The Glasgow Addition was added at the request of its inhabitants, an extended white family who wished their children to attend appellant's newly formed, all-white school district rather than the recently desegregated Jefferson County system.[3]

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[2] At the time the District Court denied appellant's motion for summary judgment, the city had 32 black inhabitants, all of them residents of a nursing home. Because these persons were not registered to vote, and because city officials were apparently unaware of their existence at the time appellant made its latest annexation of land, the District Court treated appellant as all white. 568 F. Supp., at 1456, n. 3. Appellant informs us that in addition to the black residents of the nursing home, its inhabitants now include three black families, with two blacks registered to vote. Tr. of Oral Arg. 7. Two other black families have homes under construction within the city limits. *Ibid.*

[3] Appellant's school system was subsequently found by a federal court to be an impermissible attempt to thwart the implementation of a unitary school system. *Stout* v. *Jefferson County Board of Education*, 448 F. 2d 403 (CA5 1971). Appellant was ordered to provide bus transportation to the black children assigned to its schools, but declined to do so. Ultimately, the court abolished appellant's school system and transferred control of the schools back to Jefferson County. *Stout* v. *Jefferson County Board of Education*, 466 F. 2d 1213 (CA5 1972), cert. denied *sub*

The Western Addition is uninhabited, but the District Court found that "its location and the City's plans [for relatively expensive housing] indicate that it is likely to be developed for use by white persons only." 623 F. Supp., at 784, n. 5.

While approval of the Western Annexation was pending before the Alabama Legislature, appellant's City Council voted to withdraw fire and paramedic services that appellant was providing without charge to an adjacent black neighborhood known as Pleasant Grove Highlands (Highlands). In response, inhabitants of the Highlands, which has housing comparable to that in Pleasant Grove, petitioned for annexation to the city. The City Council restored free fire protection, but did not otherwise act on the petition.[4] App. 18–19.

Appellant sought preclearance for the annexation of the Western Addition, but the Attorney General objected because he found the refusal to annex the Highlands indicative of an intent to annex only white areas.[5] The city then filed this declaratory action in the District Court for the District

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nom. Board of Education of the City of Pleasant Grove v. *Stout*, 411 U. S. 930 (1973).

[4] Appellant has since resumed free paramedic services to the Highlands, and has continued the provision of free police services. 623 F. Supp. 782, 785 (DC 1985).

At the same time that it terminated free fire and paramedic protection to the Highlands, the City Council also terminated such free services to the black Dolomite neighborhood, which likewise petitioned unsuccessfully for annexation. The District Court's opinion does not address in detail the decision not to annex the Dolomite area and we shall not consider it separately.

[5] During hearings in 1981 on the extension of the Voting Rights Act, Congress asked the Department of Justice to provide summaries of relevant cases. In summarizing the present case, the Department stated: "The Attorney General interposed a Section 5 objection to the annexation to Pleasant Grove of certain vacant land projected for all-white residential development because of the city's refusal to annex certain black areas." Extension of the Voting Rights Act: Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess., 2567 (1982).

of Columbia.[6] In denying appellant's motion for summary judgment, the court held, over one judge's dissent, that "a community may not annex adjacent white areas while applying a wholly different standard to black areas and failing to annex them based on that discriminatory standard." 568 F. Supp., at 1460. In its subsequent decision on the merits, the court, with one judge dissenting, denied declaratory relief, holding that the city had failed to carry its burden of proving that the two annexations at issue did not have the purpose of abridging or denying the right to vote on account of race.[7] This appeal followed.

II

Before addressing appellant's arguments, we find it useful to review two fundamental principles of the Voting Rights Act.

First. An annexation of inhabited land constitutes a change in voting practice or procedure subject to preclearance under § 5. *City of Richmond* v. *United States*, 422 U. S. 358, 368 (1975); *Perkins* v. *Matthews*, 400 U. S. 379, 388 (1971)). Even the annexation of vacant land on which residential development is anticipated must be precleared before those moving into the area may vote in the annexing jurisdiction. In *City of Rome* v. *United States*, 446 U. S. 156 (1980), this Court affirmed the denial of preclearance to 13 annexations, 9 of which were vacant land. See *id.*, at 194, 196 (POWELL, J., dissenting); *City of Rome, Ga.* v. *United States*, 472 F. Supp. 221, 246 (DC 1979). This holding is consistent with the well-established teaching of *Allen* v. *State Board of Elections*, 393

[6] The complaint sought relief only with respect to the Western Addition, but the District Court, when it became aware that the Glasgow Addition had never been precleared, ordered appellant to amend the complaint to include that annexation as well. 568 F. Supp., at 1456, n. 1.

[7] The court also observed that even if the burden of proving discrimination was on the United States, the court "would have had no difficulty in finding that the annexation policy of Pleasant Grove is, by design, racially-discriminatory in violation of the Voting Rights Act." 623 F. Supp., at 788, n. 30.

U. S. 544 (1969), that Congress intended the preclearance provisions of the Voting Rights Act to be given "the broadest possible scope," *id.*, at 567, and to reach "any state enactment which alter[s] the election law of a covered State in even a minor way," *id.*, at 566. Allowing a State to circumvent the preclearance requirement for annexations by annexing vacant land intended for white developments would disserve Congress' intent to reach "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Id.*, at 565. Moreover, the Attorney General, whose interpretation of the Voting Rights Act is entitled to considerable deference, see, *e. g.*, *United States* v. *Sheffield Board of Comm'rs*, 435 U. S. 110, 131 (1978), has consistently interpreted § 5 to reach the annexation of vacant land intended for residential development.[8] Finally, Congress was aware of the Attorney General's view in this regard, and implicitly approved it, when it reenacted the Voting Rights Act in 1982.[9] Cf. *id.*, at 131–135.

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[8] See Brief for United States 26, and n. 26. The Attorney General's position is as follows:

"Certain annexations, such as those of vacant land designated for use as a public park, do not require Section 5 review. Because Section 5 is concerned only with voting practices and procedures, the Attorney General does not require submission for preclearance of annexations of uninhabited land before such annexations take place. Rather, the Attorney General requires covered jurisdictions to submit such annexations for preclearance before inhabitants on the annexed area may vote in the annexing jurisdiction." *Id.*, at 21, n. 12.

[9] Indeed, in 1982 the Department apprised Congress of the Attorney General's decision not to preclear appellant's annexation of the Western Addition. See n. 5, *supra*. See also 128 Cong. Rec. 14297 (1982) (remarks of Sen. Helms) (criticizing Department of Justice decision not to preclear the annexation of an undeveloped subdivision in Wilson, N. C.); S. Rep. No. 97–417, p. 10, and n. 21 (1982) (citing United States Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals 65, which in turn notes that the Department of Justice has denied preclearance to the annexations of undeveloped areas zoned for middle-income housing).

Second. "Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent." *City of Rome*, *supra*, at 172 (emphasis in original). See also, *e. g.*, *City of Richmond*, *supra*, at 378. The burden of proving absence of discriminatory purpose and effect is on appellant. See, *e. g.*, *City of Rome*, *supra*, at 183, n. 18.

III

The city does not claim that either of the two annexations was not a change in voting practices subject to preclearance under § 5, even though the Western Addition was at the time uninhabited.[10] Neither does it disagree that it must prove that the two annexations had neither the discriminatory purpose nor effect prohibited by § 5 of the Act. Its challenge is to the District Court's conclusion that the city had not carried its burden of showing that the annexations were untainted by a racially discriminatory purpose. In arriving at this judgment, the District Court relied on a variety of evidence, principally its finding that the refusal to annex the Highlands while annexing other areas was racially motivated. These findings, both as to the purpose of not annexing the Highlands and with respect to the weight of the evidence regarding the purpose of the two annexations at issue, are findings of fact that we must accept unless clearly erroneous. The city has not convinced us that they are.

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[10] The dissent finds it "difficult to see how the Court justifies applying § 5 preclearance procedures at all" to the annexation of the Western Addition, because the annexation did not immediately enlarge the number of eligible voters. *Post*, at 477. It may be that Pleasant Grove could have delayed seeking preclearance for the Western Addition until that area had inhabitants desiring to vote, see n. 8, *supra*, but it is understandable that the city chose to seek preclearance at an earlier juncture: developing a tract of land is an expensive proposition, and the marketability of the new homes may depend on assurances that buyers will be entitled to all the benefits of residency in the city—including voting. The Attorney General's decision to permit Pleasant Grove to seek preclearance at the time it did accommodates the city's interests and was surely not forbidden by § 5.

Appellant insists, as it did below, that its failure to annex the Highlands was not racially motivated, but based upon economic considerations. The District Court found this justification "a mere pretext for race-biased annexation decisions." 623 F. Supp., at 784. The court found that appellant's economic argument was developed after the fact and was not the true basis for the decision not to annex the Highlands. *Id.*, at 784–785. Furthermore, the court found that appellant's argument did not reflect economic realities in a number of respects. For example, appellant's calculation of the costs of annexing the Highlands included the cost of services it was already providing *gratis* to that neighborhood. *Id.*, at 786–787. Appellant also failed to consider that annexing the Highlands would generate immediate ad valorem taxes and possibly development fees from the construction of new homes. *Id.*, at 786. At the same time, appellant's comparative estimate of the revenues that would be generated by the Western Addition failed to take into account such necessary costs as the construction of a new fire station, a major traffic artery, and a new neighborhood park. *Id.*, at 787, n. 21. The District Court concluded that refusing to annex the Highlands was racially motivated.

Appellant argues that even if its decision not to annex the Highlands was racially motivated, that decision was not a change respecting voting and hence not subject to § 5. That point is correct but not dispositive; as the Solicitor General argues: "[T]he failure to annex [black] areas, while the city was simultaneously annexing non-black areas, is highly significant in demonstrating that the city's annexation here was purposefully designed to perpetuate Pleasant Grove as an enlarged enclave of white voters." Brief for United States 21, n. 12.

Appellant also relies on the fact that there were no black voters in Pleasant Grove at the time the relevant annexation decisions were made, so that the annexations did not reduce the proportion of black voters or deny existing black voters

representation equivalent to their political strength in the enlarged community. Cf. *City of Richmond* v. *United States*, 422 U. S., at 370–371. Appellant contends that since the annexations could not possibly have caused an impermissible effect on black voting, it makes no sense to say that appellant had a discriminatory purpose. This argument is based on the incorrect assumption that an impermissible purpose under § 5 can relate only to present circumstances. Section 5 looks not only to the present effects of changes, but to their future effects as well, as shown by the fact that annexations of vacant land are subject to preclearance even though no one's right to vote is immediately affected. See *supra*, at 467–468, and n. 8. Likewise, an impermissible purpose under § 5 may relate to anticipated as well as present circumstances.[11]

It is quite plausible to see appellant's annexation of the Glasgow and Western Additions as motivated, in part, by the impermissible purpose of minimizing future black voting

[11] Appellant's argument is also incorrect insofar as it implies that a covered jurisdiction can short-circuit a purpose inquiry under § 5 by arguing that the intended result was not impermissible under an objective effects inquiry. Much of the dissent's argument is to the same effect. See *post*, at 474–477. We rejected such reasoning in *City of Richmond* v. *United States*, 422 U. S. 358 (1975). There, an annexation deprived blacks of majority voting status, but we held that no impermissible effect had been shown because "the post-annexation electoral system fairly recognize[d] the [black] minority's political potential." *Id.*, at 378. But while the effect of reducing the relative strength of the black vote was, standing alone, perfectly legal, we found it necessary to remand the case for further inquiry into purpose. In so doing, we stated:

"[I]t may be asked how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section and why we need remand for further proceedings with respect to purpose alone. The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. . . . An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, whatever its actual effect may have been or may be." *Id.*, at 378–379.

strength.[12] Common sense teaches that appellant cannot indefinitely stave off the influx of black residents and voters—indeed, the process of integration, long overdue, has already begun. See *supra*, at 465, n. 2. One means of thwarting this process is to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote in advance. This is just as impermissible a purpose as the dilution of present black voting strength. Cf. *City of Richmond*, *supra*, at 378. To hold otherwise would make appellant's extraordinary success in resisting integration thus far a shield for further resistance. Nothing could be further from the purposes of the Voting Rights Act.

In light of the record before us, we are not left with the definite and firm conviction that the District Court was mistaken either in finding that the refusal to annex the Highlands was racially motivated or that there was insufficient proof that the annexation of the Glasgow and Western Additions did not have a purpose forbidden by § 5. Those findings are not, therefore, clearly erroneous. *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985).

The judgment of the District Court is accordingly

Affirmed.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

The Court today affirms the decision of the District Court, holding that a city can act with a purpose to "den[y] or abridg[e]" black voting rights, 42 U. S. C. § 1973c, even when the city's actions can have no present effect on the voting rights of any black individual and any future effect on black voting rights is purely speculative. Because the Court's finding of a violation of the Voting Rights Act is inconsistent with the language and purpose of the Act, I dissent.

[12] To the extent that there is any doubt on the subject, it should be remembered that appellant has the burden of proving the *absence* of discriminatory purpose respecting voting. See *supra*, at 469.

I

Before examining the decision in this case, it is appropriate to restate the principles articulated in this Court's decisions under § 5 of the Voting Rights Act. We have consistently noted: "The language of § 5 clearly provides that it applies only to proposed *changes* in voting procedures." *Beer* v. *United States*, 425 U. S. 130, 138 (1976) (emphasis added). See *Allen* v. *State Board of Elections*, 393 U. S. 544, 566 (1969). In *Perkins* v. *Matthews*, 400 U. S. 379 (1971), the Court first found that a proposed annexation could constitute a "change" in voting procedures covered by § 5. It explained the reason for this holding: "[Section] 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in *a change in the composition of the electorate affected by an annexation.*" *Id.*, at 388–389 (emphasis added). See *Port Arthur* v. *United States*, 459 U. S. 159, 161 (1982) ("*Perkins* . . . held that changes in the boundary lines of a city by annexations *that enlarge the number of eligible voters* are events covered by § 5") (emphasis added). Thus, this Court's decisions establish that preclearance under § 5 is required when—and only when—an annexation changes the previous "voting procedures" by altering the number or racial composition of the municipal voters.

We also have defined the type of change in voting procedures that violates the Voting Rights Act: "'[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the franchise.'" *Lockhart* v. *United States*, 460 U. S. 125, 134 (1983) (quoting *Beer* v. *United States*, *supra*, at 141). An annexation can have such a retrogressive effect on the voting rights of blacks by "dilut[ing] the weight of the votes of the voters to whom the franchise was limited before the annexation." *Perkins* v. *Matthews*, *supra*, at 388. But the Court's inquiry has not terminated with a finding that a

proposed annexation "reduc[es] the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation." *City of Richmond* v. *United States*, 422 U. S. 358, 378 (1975). An annexation that dilutes the minority vote "is not a statutory violation as long as the post-annexation electoral system fairly recognizes the minority's political potential." *Ibid.*

While this Court's decisions have made clear that a voting-procedure change must lack both discriminatory purpose and effect to survive § 5 scrutiny, *City of Rome* v. *United States*, 446 U. S. 156, 172 (1980), the Court has always recognized that a discriminatory purpose within the meaning of § 5 must relate to voting. This Court's broad statement respecting discriminatory purpose under § 5 must be read in context:

> "An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes *taken with the purpose of denying the vote on the grounds of race or color.* Congress surely has the power to prevent such gross racial slurs, the only point of which is 'to despoil colored citizens, and only colored citizens, of their theretofore enjoyed *voting rights.*' *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347 (1960)." *City of Richmond* v. *United States*, *supra*, at 378 (emphasis added).

Thus, the previous decisions of this Court make explicitly clear that for a city to have a discriminatory purpose within the meaning of the Voting Rights Act, it must intend its action to have a retrogressive effect on the voting rights of blacks. *Lockhart* v. *United States*, *supra*, at 134.

II

The Court today affirms a finding that in annexing the two parcels of land at issue, the city had the purpose, prohibited by the Voting Rights Act, "of denying or abridging the right

to vote on account of race or color." 42 U. S. C. § 1973c. Because the actions challenged in this case could not have had *any* effect on minority voting rights, much less a retrogressive effect, it is clear that the city of Pleasant Grove could not have acted with such an intent respecting either of the annexations at issue in this case.

A

When the Glasgow Addition was annexed in 1969, it contained only one family of 12 white voters. Now, more than 15 years later, this 40-acre tract still contains only one family that currently numbers 20 white voters. Of course, one can say that the addition of a handful of white voters to a community of some 7,000 white residents "enlarge[d] the number of eligible voters." *Port Arthur* v. *United States*, *supra*, at 161. The same could be said if an annexation added only *one* white voter. But a finding that either annexation was motivated by its anticipated effect on *voting* rights is out of touch with reality. The "dilution" of any resident's voting rights from an annexation such as the Glasgow Addition—20 votes in a city of 7,000 residents—could not constitute a retrogression in voting rights under the Act. No showing has been made—and indeed none could be made—that a change of this number of white voters over a 15-year period has had any effect on voting rights. Nor has the annexation in any way "change[d] . . . the composition of the electorate." *Perkins* v. *Matthews*, *supra*, at 389. The city was composed solely of white voters before and after the annexation of the Glasgow Addition. The annexation therefore could not have had *any effect whatsoever* on minority voting rights, and the city could not have acted with a purpose to dilute the voting rights of black municipal voters.

The Court attempts to avoid this conclusion by finding that a retrogression in voting rights, for the purpose of ascertaining discriminatory motivation, can be gauged by the effect of the annexation on some hypothetical future black munici-

pal voters. According to this speculative reasoning, *if* one assumes that some hypothetical black voters will move into Pleasant Grove in the future, and *if* one further assumes that the racial composition of the Glasgow Addition will remain unchanged, the hypothetical black voters will find their voting strength diluted from what it would have been absent the annexation.[1] But such speculation in finding a discriminatory purpose on the part of a state actor is illogical and unprecedented. Although we have stated that § 5 reaches changes with the "potential for racial discrimination in voting," *Perkins* v. *Matthews*, 400 U. S., at 389, the "potential" refers to present and concrete effects, not effects based only on speculation as to what *might* happen at some time in the future. Under § 5, the Court consistently has looked to the effect of a voting change on the present minority residents of the relevant political subdivision. See *City of Richmond* v. *United States*, *supra*, at 378 (The relevant comparison in assessing whether "the post-annexation electoral system fairly recognizes the minority's political potential" is between "the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation").[2] Where an annexation's effect on voting rights is

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[1] It is difficult even to hypothesize a situation in which the foreseeable effect on black voting rights from an addition of a 20-member white family would be anything more than *de minimis*. Where the hypothetical effect of an annexation cannot be to dilute black voting strength within the meaning of the Voting Rights Act, to impute such a purpose to the city is irrational.

[2] At issue in *City of Richmond* was the proposed annexation by the city of 23 square miles of adjacent land. The preannexation population of the city was 202,359, of which 104,207 or 52% were black citizens. The annexation would have added 47,262 people to the city's population, of whom 1,557 were black. The postannexation population of the city would have been 249,621, of which 105,764 or 42% would have been black. 422 U. S., at 363. The proposed annexation thus would have significantly changed the composition of the municipal electorate and substantially reduced black voting strength within the city.

purely hypothetical, an inference that the city acted with a motivation related to *voting* rights is unsupportable.

B

The Western Addition, annexed in 1979, is a parcel of vacant land. Its annexation did not and could not in any way "change . . . the composition of the electorate." *Perkins* v. *Matthews*, *supra*, at 389. It did not even "enlarge the number of eligible voters." *Port Arthur* v. *United States*, 459 U. S., at 161. Thus, it is difficult to see how the Court justifies applying § 5 preclearance procedures at all. But even if one assumes that the § 5 procedures apply, this annexation could not have been motivated by a discriminatory purpose proscribed by the Voting Rights Act. There is no basis for imputing an intent to deny or abridge the voting rights of blacks when a community of white citizens annexes completely vacant land. The annexation did not exclude or include a *single* voter in Pleasant Grove. Nor could the annexation have been intended to have a retrogressive effect on black voting rights when there were no black voters in the city and no voters, white or black, in the Western Addition.

The Court again relies on future hypothetical black voters to find that the city acted with a "purpose of denying the vote on the grounds of race or color." *City of Richmond* v. *United States*, 422 U. S., at 378. Under the same reasoning employed to invalidate the annexation of the Glasgow Addition, the Court relies on its speculation that *if* the Western Addition became populated with whites and *if* black voters moved into the city at some time in the future, their vote would be less effective than it would have been had the annexation not occurred. But the Court's theory is even more speculative when applied to the annexation of the vacant Western Addition. There is no way for the city to ensure that black individuals do not move into the Western Addition. The Fourteenth Amendment and various civil rights laws prohibit racially discriminatory state action, and fair

housing laws prevent private action that would discourage black individuals from moving into the area. The District Court's conclusion that the Western Addition "is likely to be developed for use by white persons only," 568 F. Supp. 1455, 1457, n. 8 (DC 1983), is sheer speculation. Whites as well as blacks lawfully can move into this area, and not even the prescience of federal courts can predict the extent to which this will occur or whether there ever will be any denial or dilution of the voting rights of blacks.[3]

C

The Court seeks support for its finding that the city acted with discriminatory motivation in the fact that it has declined in the past to annex three predominantly black communities.[4] In his dissent from the decision of the District Court, Judge MacKinnon persuasively pointed out that the city's economic justification for its annexation policy is plausible. 623 F. Supp. 782, 793–795 (DC 1985). Even if one agreed with the District Court's view that the economic justification was flawed, this would not support the conclusion that the city acted in this case with a discriminatory motivation *prohibited by the Voting Rights Act*. The Government concedes that a failure to annex is not a voting-procedure "change" covered by §5. See Brief for United States 21, n. 12. Nothing in the legislative history of §5 or in any decision

[3] If we are to engage in speculation, an equally logical, if not more compelling, assumption is that the annexation of the Western Addition will *increase* the black voting strength in the city. The Western Addition is zoned to contain 700 residences. With the sale of each home, the possibility exists that a potential black voter will become a city resident. The same possibility exists with each sale of an existing home in Pleasant Grove. Logically, the increase that the annexation causes in the number of homes for sale should increase the probability that a black individual will buy one and become a municipal voter.

[4] In 1971, the city denied the annexation request of an area including the historically all-black Woodward School. In 1979, the city denied the annexation requests of the all-black Pleasant Grove Highlands and the predominantly black Dolomite area.

of this Court is to the contrary. The only possible relevance of the failure to annex is to the city's intent respecting the annexations that did occur. The desire of the city to annex a vacant parcel of land and a parcel inhabited by one white family, combined with the failure to annex black communities, is relevant—if at all—only if the motivation inferred fairly can be said to relate to voting. Even if the city desired to exclude persons from the city because of their race, the annexations at issue could not possibly deny, abridge, or in any way effect a retrogression in any black individual's municipal voting rights. The Court's holding that the city nevertheless intended to impair black voting rights is without justification.

III

As Judge MacKinnon noted in his dissent from the District Court's opinion: "There may, in fact, be actionable constitutional violations occurring in the City." 568 F. Supp., at 1462. But the possible existence of discriminatory intent and conduct unrelated to voting does not justify finding the city liable under the Voting Rights Act. We normally presume that state actors respect the guarantees of the Constitution, and we require an individual who alleges otherwise to *prove* the existence of purposeful discrimination. See *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265 (1977); *Washington* v. *Davis*, 426 U. S. 229, 240 (1976). The Voting Rights Act shifts the burden of proof to the state actor to prove the absence of discriminatory purpose. This Court upheld this unusual intrusion by the Act on state sovereignty specifically because its procedures were rationally related to the Fifteenth Amendment's guarantee respecting the right to vote. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 325, 337 (1966). This shift in the burden of proof is justified *only* when the challenged conduct relates to voting. Here, the Court finds the city's conduct in fact related to voting when such a relationship cannot rationally exist.

In sum, the Court's reading of the Voting Rights Act divorces the Act from its constitutional justification—protecting *voting* rights—and represents an extension of the Act beyond even its "broadest possible scope," *Allen* v. *State Board of Elections*, 393 U. S., at 567. Accordingly, I dissent.

INTERNATIONAL PAPER CO. *v.* OUELLETTE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85–1233. Argued November 4, 1986—Decided January 21, 1987

The Clean Water Act (Act) prohibits the discharge of effluents into navigable waters unless the point source has obtained a permit from the Environmental Protection Agency (EPA). The Act also allows the State in which the point source is located (the "source State") to impose more stringent discharge limitations than the federal ones, and even to administer its own permit program if certain requirements are met. In contrast, "affected" States that are subject to pollution originating in source States have only the right to notice and to comment before the issuance of a federal or source State permit. The Act also contains a "saving clause" consisting of § 510, which provides that "nothing in this chapter shall . . . be construed as impairing . . . any right . . . of the States with respect to the waters (including boundary waters) of such States," and § 505(e), which states that "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . ." Petitioner operates a paper mill on the New York side of Lake Champlain and, in the course of its business, discharged effluents into the lake through a diffusion pipe that ended shortly before the New York-Vermont border that divided the lake. Respondents, property owners on the Vermont shore, filed a class action against petitioner in Vermont state court under the Vermont common law of nuisance. The action was later removed to Federal District Court. Petitioner moved for summary judgment and judgment on the pleadings on the ground that the Act pre-empted respondents' state-law suit, but the District Court denied the motion, holding that the Act's saving clause preserves actions to redress interstate water pollution under the law of the State in which the injury occurred. The Court of Appeals affirmed.

Held:

1. The Act pre-empts the common law of an affected State to the extent that that law seeks to impose liability on a point source in another State. Pp. 487–497.

(a) Since the Act applies to all point sources and virtually all bodies of water, sets forth detailed procedures for obtaining a permit, and provides an elaborate set of remedies for its violation, it is sufficiently com-

prehensive to raise a presumption that Congress intended to pre-empt all state-law suits except those specifically preserved by the Act's terms. Pp. 491–492.

(b) The Act's saving clause cannot be read broadly to preserve the right to bring suit under the law of an affected State. Section 505(e) merely protects state-law suits from pre-emption by the Act's citizen-suit provisions, and does not purport to preclude pre-emption by other provisions. Furthermore, § 510 can be read to preserve a State's authority only with respect to effluent discharges within that State. Pp. 492–493.

(c) The application of an affected State's nuisance law to a point source in another State would constitute a serious interference with the implementation of the Act. It would effectively override the EPA's permit requirements and the policy choices made by source States in adopting their own standards, and would engender confusion by subjecting point sources to a variety of often vague and indeterminate common-law rules established by different States along the interstate waterways. Pp. 494–497.

2. The District Court correctly denied petitioner's motion for summary judgment and judgment on the pleadings. Pp. 497–500.

(a) The Court's pre-emption holding does not leave respondents without a remedy. Since the Act precludes only those suits that require effluent control standards incompatible with those established by the Act's procedures, and since the Act's saving clause specifically preserves other state actions, aggrieved parties can bring a nuisance claim under the law of the source State, here, New York. Pp. 497–500.

(b) The Act pre-empts laws, not courts, and nothing in its provisions prevents a court sitting in an affected State from hearing a common-law nuisance suit, provided that jurisdiction otherwise is proper. A district court sitting in diversity is competent to apply the law of a foreign State, and, therefore, Vermont was a proper forum in this case. P. 500.

776 F. 2d 55, affirmed in part, reversed in part, and remanded.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 500. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined, *post*, p. 508.

Roy L. Reardon argued the cause for petitioner. With him on the briefs were *Albert X. Bader, Jr.*, and *Caroline T. Mitchell.*

Peter F. Langrock argued the cause for respondents. With him on the brief were *Emily J. Joselson, Jeffrey L. Amestoy*, Attorney General of Vermont, and *Merideth Wright*, Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Fried, Assistant Attorney General Habicht, Richard J. Lazarus*, and *Jacques B. Gelin.**

JUSTICE POWELL delivered the opinion of the Court.

This case involves the pre-emptive scope of the Clean Water Act, 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.* (CWA or Act).[1] The question presented is whether the Act pre-empts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York.

I

Lake Champlain forms part of the border between the States of New York and Vermont. Petitioner International

**John M. Cannon, Susan W. Wanat*, and *Ann Plunkett Sheldon* filed a brief for the Mid-America Legal Foundation as *amicus curiae* urging reversal.

A brief for the State of Tennessee et al. urging affirmance was filed by *W. J. Michael Cody*, Attorney General, *John Knox Walkup*, Chief Deputy Attorney General, *Frank J. Scanlon*, Deputy Attorney General, *Michael D. Pearigen*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *John K. Van de Kamp* of California, *Joseph I. Lieberman* of Connecticut, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Thomas J. Miller* of Iowa, *William L. Webster* of Missouri, *Robert M. Spire* of Nebraska, *Michael C. Turpen* of Oklahoma, *Arlene Violet* of Rhode Island, *T. Travis Medlock* of South Carolina, *Mark V. Meierhenry* of South Dakota, and *Mary Sue Terry* of Virginia.

[1] The statute also is known as the Federal Water Pollution Control Act. See note following 33 U. S. C. § 1251.

Paper Company (IPC) operates a pulp and paper mill on the New York side of the lake. In the course of its business, IPC discharges a variety of effluents into the lake through a diffusion pipe. The pipe runs from the mill through the water toward Vermont, ending a short distance before the state boundary line that divides the lake.

Respondents are a group of property owners who reside or lease land on the Vermont shore. In 1978 the owners filed a class action suit against IPC, claiming, *inter alia*, that the discharge of effluents constituted a "continuing nuisance" under Vermont common law. Respondents alleged that the pollutants made the water "foul, unhealthy, smelly, and . . . unfit for recreational use," thereby diminishing the value of their property. App. 29. The owners asked for $20 million in compensatory damages, $100 million in punitive damages, and injunctive relief that would require IPC to restructure part of its water treatment system.[2] The action was filed in State Superior Court, and then later removed to Federal District Court for the District of Vermont.

IPC moved for summary judgment and judgment on the pleadings, claiming that the CWA pre-empted respondents' state-law suit. With the parties' consent, the District Judge deferred a ruling on the motion pending the decision by the Court of Appeals for the Seventh Circuit in a similar case involving Illinois and the city of Milwaukee. In that dispute, Illinois filed a nuisance action against the city under Illinois statutory and common law, seeking to abate the alleged pollution of Lake Michigan. *Illinois* v. *Milwaukee*, 731 F. 2d 403 (1984) *(Milwaukee III)*, cert. denied, 469 U. S. 1196 (1985).[3] The Court of Appeals ultimately remanded the case

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[2] The complaint also sought monetary and injunctive relief for air pollution allegedly caused by the IPC mill. App. 35–36. This claim is not before the Court.

[3] The decisions in *Illinois* v. *Milwaukee*, 406 U. S. 91 (1972) *(Milwaukee I)*, and *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981) *(Milwaukee II)*, are discussed in Part II, *infra*.

for dismissal of Illinois' claim, finding that the CWA precluded the application of one State's law against a pollution source located in a different State. The decision was based in part on the court's conclusion that the application of different state laws to a single "point source"[4] would interfere with the carefully devised regulatory system established by the CWA. 731 F. 2d, at 414. The court also concluded that the only suits that were *not* pre-empted were those alleging violations of the laws of the polluting, or "source," State. *Id.*, at 413–414.

IPC argued that the holding in *Milwaukee III* was dispositive in this case. The Vermont District Court disagreed and denied the motion to dismiss. 602 F. Supp. 264 (1985). The court acknowledged that federal law normally governs interstate water pollution. It found, however, that two sections of the CWA explicitly preserve state-law rights of action. First, § 510 of the Act provides:

> "Except as expressly provided . . . , nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U. S. C. § 1370.

In addition, § 505(e) states:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . ." 33 U. S. C. § 1365(e).

The District Court held that these two provisions (together, "the saving clause") made it clear that federal law did not pre-empt entirely the rights of States to control pollution.

[4] A "point source" is defined by the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U. S. C. § 1362(14); see 40 CFR § 122.2 (1986). It is not disputed that IPC is a point source within the meaning of the Act.

Therefore the question presented, said the court, was which *types* of state suits Congress intended to preserve. It considered three possibilities:[5] first, the saving clause could be construed to preserve state law only as it applied to waters not covered by the CWA. But since the Act applies to virtually all surface water in the country,[6] the District Court rejected this possibility. Second, the saving clause might preserve state nuisance law only as it applies to discharges occurring within the source State; under this view a claim could be filed against IPC under New York common law, but not under Vermont law. This was the position adopted by the Court of Appeals for the Seventh Circuit in *Milwaukee III*. The District Court nevertheless rejected this option, finding that "there is simply nothing in the Act which suggests that Congress intended to impose such limitations on the use of state law." 602 F. Supp., at 269.

The District Court therefore adopted the third interpretation of the saving clause, and held that a state action to redress interstate water pollution could be maintained under the law of the State in which the injury occurred. *Ibid.* The court was unpersuaded by the concern expressed in *Milwaukee III* that the application of out-of-state law to a point source would conflict with the CWA. It said there was no interference with the procedures established by Congress because a State's "imposition of compensatory damage awards and other equitable relief for injuries caused . . . merely *sup-*

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[5] For a discussion of each of the three interpretations of the saving clause, see Note, *City of Milwaukee v. Illinois:* The Demise of the Federal Common Law of Water Pollution, 1982 Wis. L. Rev. 627, 664–671.

[6] While the Act purports to regulate only "navigable waters," this term has been construed expansively to cover waters that are not navigable in the traditional sense. See *United States* v. *Riverside Bayview Homes*, 474 U. S. 121 (1985); 33 U. S. C. § 1362(7) (defining navigable waters as "waters of the United States"); 118 Cong. Rec. 33756–33757 (1972), 1 Legislative History of Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 250 (1973) (hereinafter Leg. Hist.).

plement the standards and limitations imposed by the Act." 602 F. Supp., at 271 (emphasis in original). The court also found that the use of state law did not conflict with the ultimate goal of the CWA, since in each case the objective was to decrease the level of pollution. *Ibid.*

The District Court certified its decision for interlocutory appeal, see 28 U. S. C. § 1292(b) (1982 ed., Supp. III), and the Court of Appeals for the Second Circuit affirmed for the reasons stated by the District Court. 776 F. 2d 55, 56 (1985) *(per curiam)*. We granted certiorari to resolve the circuit conflict on this important issue of federal pre-emption. 475 U. S. 1081 (1986). We now affirm the denial of IPC's motion to dismiss, but reverse the decision below to the extent it permits the application of Vermont law to this litigation. We hold that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located.

II

A brief review of the regulatory framework is necessary to set the stage for this case. Until fairly recently, federal common law governed the use and misuse of interstate water. See, *e. g.*, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110 (1938) (water apportionment); *Missouri* v. *Illinois*, 200 U. S. 496 (1906) (water pollution).[7] This principle was called into question in the context of water pollution in 1971, when the Court suggested in dicta that an interstate dispute between a State and a private company should be resolved by reference to state nuisance law. *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 499, n. 3 (1971) ("[A]n action such as this, if otherwise cognizable in

[7] Accord, *North Dakota* v. *Minnesota*, 263 U. S. 365 (1923); cf. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907) (air pollution); see also *Milwaukee I*, 406 U. S., at 104–107; Glicksman, Federal Preemption and Private Legal Remedies for Pollution, 134 U. Pa. L. Rev. 121, 152–155 (1985); Note, 1982 Wis. L. Rev., at 630–636.

federal district court, would have to be adjudicated under state law") (citing *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938)).

We had occasion to address this issue in the first of two Supreme Court cases involving the dispute between Illinois and Milwaukee. In *Milwaukee I*, the State moved for leave to file an original action in this Court, seeking to enjoin the city from discharging sewage into Lake Michigan. *Illinois* v. *Milwaukee*, 406 U. S. 91 (1972). The Court's opinion in that case affirmed the view that the regulation of interstate water pollution is a matter of federal, not state, law, thus overruling the contrary suggestion in *Wyandotte*.[8] 406 U. S., at 102, n. 3. The Court was concerned, however, that the existing version of the Act was not sufficiently comprehensive to resolve all interstate disputes that were likely to arise. *Milwaukee I* therefore held that these cases should be resolved by reference to federal common law; the implicit corollary of this ruling was that state common law was pre-empted. See *id.*, at 107, n. 9; *Milwaukee III*, 731 F. 2d, at 407. The Court noted, though, that future action by Congress to regulate water pollution might pre-empt federal common law as well. 406 U. S., at 107.

Congress thereafter adopted comprehensive amendments to the Act. We considered the impact of the new legislation when Illinois and Milwaukee returned to the Court several years later.[9] *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981)

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[8] Although the Court's opinion could be read as distinguishing rather than overruling that part of *Wyandotte*, a later decision made it clear that state common-law actions did not survive *Milwaukee I*. See *Milwaukee II*, 451 U. S., at 327, n. 19; see also Glicksman, *supra*, at 156, n. 176.

[9] In *Milwaukee I* the Court denied a motion to file an original action but ruled that Illinois could maintain an action in federal district court. The State then filed suit in Illinois District Court, alleging that the city was liable for creating a public nuisance under both federal and Illinois common law. The complaint also alleged a violation of the State Environmental Protection Act. See *Milwaukee II*, *supra*, at 310, and n. 4; *Milwaukee III*, 731 F. 2d, at 404.

(Milwaukee II). There the Court noted that the amendments were a "'complete rewriting'" of the statute considered in *Milwaukee I*, and that they were "'the most comprehensive and far reaching'" provisions that Congress ever had passed in this area. 451 U. S., at 317–318 (citations to legislative history omitted). Consequently, the Court held that federal legislation now occupied the field, pre-empting all *federal* common law. The Court left open the question of whether injured parties still had a cause of action under *state* law. *Id.*, at 310, n. 4. The case was remanded for further consideration; the result on remand was the decision of the Court of Appeals for the Seventh Circuit in *Milwaukee III*, discussed *supra*.

One of the primary features of the 1972 amendments is the establishment of the National Pollutant Discharge Elimination System (NPDES), a federal permit program designed to regulate the discharge of polluting effluents. 33 U. S. C. § 1342; see generally *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S. 200, 205–208 (1976) (describing NPDES system). Section 301(a) of the Act, 33 U. S. C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit from the Environmental Protection Agency (EPA). The permits contain detailed effluent limitations, and a compliance schedule for the attainment of these limitations.

The amendments also recognize that the States should have a significant role in protecting their own natural resources. 33 U. S. C. § 1251(b). The Act provides that the Federal Government may delegate to a State the authority to administer the NPDES program with respect to point sources located within the State, if the EPA Administrator determines that the proposed state program complies with the requirements set forth at 33 U. S. C. § 1342(b). The Administrator retains authority, however, to block the issuance of any permit to which he objects. § 1342(d). Even if

the Federal Government administers the permit program, the source State may require discharge limitations more stringent than those required by the Federal Government. See 40 CFR § 122.1(f) (1986). Before the Federal Government may issue an NPDES permit, the Administrator must obtain certification from the source State that the proposed discharge complies with the State's technology-based standards and water-quality-based standards. 33 U. S. C. § 1341(a)(1). The CWA therefore establishes a regulatory "partnership" between the Federal Government and the source State.

While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. Before a federal permit may be issued, each affected State is given notice and the opportunity to object to the proposed standards at a public hearing. 33 U. S. C. § 1341(a)(2); *Milwaukee III*, *supra*, at 412. An affected State has similar rights to be consulted before the source State issues its own permit; the source State must send notification, and must consider the objections and recommendations submitted by other States before taking action.[10] § 1342(b). Significantly, however, an affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the discre-

[10] For a more detailed description of the permit system, see R. Zener, Guide to Federal Environmental Law 61–88 (1981).

At one point IPC was operating under a federal NPDES permit. App. 29–30. A draft of the permit was submitted to Vermont as an affected State, and Vermont as well as other interested parties objected to the proposed discharge standards. *Id.*, at 65–66. Thereafter, New York obtained permitting authority under 33 U. S. C. § 1342(b) and it now administers the permit.

tion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters. § 1342(d)(2). Also, an affected State may not establish a separate permit system to regulate an out-of-state source. See § 1342(b) (State may establish permit system for waters "within *its* jurisdiction") (emphasis added), *Lake Erie Alliance for Protection of Coastal Corridor* v. *U. S. Army Corps of Engineers*, 526 F. Supp. 1063, 1074–1075 (WD Pa. 1981), aff'd, 707 F. 2d 1392 (CA3), cert. denied, 464 U. S. 915 (1983); *State* v. *Champion International Corp.*, 709 S. W. 2d 569 (Tenn. 1986), cert. pending, No. 86–57. Thus the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program.

III

With this regulatory framework in mind, we turn to the question presented: whether the Act pre-empts Vermont common law to the extent that law may impose liability on a New York point source. We begin the analysis by noting that it is not necessary for a federal statute to provide explicitly that particular state laws are pre-empted. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 713 (1985). Although courts should not lightly infer pre-emption,[11] it may be presumed when the federal legislation is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Ibid.* (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)). In addition to express or implied pre-emption, a state law also is invalid to the extent that it "actually conflicts with a . . . federal statute." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978). Such a

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[11] See *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Milwaukee II*, 451 U. S., at 312; see also *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 255 (1984).

conflict will be found when the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, *supra*, at 713 (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)).

A

As we noted in *Milwaukee II*, Congress intended the 1972 Act amendments to "establish an all-encompassing program of water pollution regulation." 451 U. S., at 318. We observed that congressional "views on the comprehensive nature of the legislation were practically universal." *Id.*, at 318, n. 12 (citing legislative history). An examination of the amendments amply supports these views. The Act applies to all point sources and virtually all bodies of water, and it sets forth the procedures for obtaining a permit in great detail. The CWA also provides its own remedies, including civil and criminal fines for permit violations, and "citizen suits" that allow individuals (including those from affected States) to sue for injunctions to enforce the statute.[12] In light of this pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, *Milwaukee I*, 406 U. S., at 107, it is clear that the only state suits that remain available are those specifically preserved by the Act.

Although Congress intended to dominate the field of pollution regulation, the saving clause negates the inference that Congress "left no room" for state causes of action. Respondents read the language of the saving clause broadly to preserve both a State's right to regulate its waters, 33 U. S. C. § 1370, and an injured party's right to seek relief under "any statute *or common law*," § 1365(e) (emphasis added). They claim that this language and selected portions of the legisla-

[12] See 33 U. S. C. §§ 1319(a), 1365(a), (h); see generally *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13–14 (1981) (discussing "elaborate" remedial provisions).

tive history compel the inference that Congress intended to preserve the right to bring suit under the law of any affected State.[13] We cannot accept this reading of the Act.

To begin with, the plain language of the provisions on which respondents rely by no means compels the result they seek. Section 505(e) merely says that "[n]othing *in this section*," *i. e.*, the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act. Section 510, moreover, preserves the authority of a State "with respect to the waters (including boundary waters) of such Stat[e]." This language arguably limits the effect of the clause to discharges flowing *directly* into a State's own waters, *i. e.*, discharges from within the State. The savings clause, then, does not preclude pre-emption of the law of an affected State.

Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action based on the law of an affected State. Cf. *City of Rome* v. *United States*, 446 U. S. 156, 199 (1980) (POWELL, J., dissenting) ("We resort to legislative materials only when the congressional mandate is unclear on its face"). After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the "full purposes and objectives of Con-

[13] A Senate Report accompanying the amendments states: "[I]f damages could be shown, other remedies [in addition to a citizen suit] would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S. Rep. No. 92-414, p. 81 (1971), 2 Leg. Hist. 1499. Respondents also note that after reviewing the legislative history, the District Court found no evidence that Congress intended to alter the traditional tort law principle that a party may bring suit in the State where the injury occurred. See *Young* v. *Masci*, 289 U. S. 253, 258-259 (1933).

gress." See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, *supra*, at 713. Because we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause,[14] we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.

B

In determining whether Vermont nuisance law "stands as an obstacle" to the full implementation of the CWA, it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal. See *Michigan Canners & Freezers Assn.* v. *Agricultural Marketing & Bargaining Bd.*, 467 U. S. 461, 477 (1984). In this case the application of Vermont law against IPC would allow respondents to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act.

By establishing a permit system for effluent discharges, Congress implicitly has recognized that the goal of the CWA—elimination of water pollution—cannot be achieved immediately, and that it cannot be realized without incurring costs. The EPA Administrator issues permits according to established effluent standards and water quality standards, that in turn are based upon available technology, 33 U. S. C. § 1314, and competing public and industrial uses, § 1312(a). The Administrator must consider the impact of the discharges on the waterway, the types of effluents, and the schedule for compliance, each of which may vary widely

[14] We noted in *Milwaukee II:*

"The fact that the language of [the saving clause] is repeated *in haec verba* in the citizen-suit provisions of a vast array of environmental legislation . . . indicates that it does not reflect any considered judgment about what other remedies were previously available or continue to be available under any particular statute." 451 U. S., at 329, n. 22.

among sources. If a State elects to impose its own standards, it also must consider the technological feasibility of more stringent controls. Given the nature of these complex decisions, it is not surprising that the Act limits the right to administer the permit system to the EPA and the source States. See § 1342(b).

An interpretation of the saving clause that preserved actions brought under an affected State's law would disrupt this balance of interests. If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State. The affected State's nuisance laws would subject the point source to the threat of legal and equitable penalties if the permit standards were less stringent than those imposed by the affected State. Such penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits. This case illustrates the problems with such a rule. If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum IPC would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability. In suits such as this, an affected-state court also could require the source to cease operations by ordering immediate abatement. Critically, these liabilities would attach even though the source had complied fully with its state and federal permit obligations. The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources.[15]

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[15] The interpretation of the Act adopted by the courts below also would have the result of allowing affected States effectively to set discharge standards without consulting with the source State, even though source

Application of an affected State's law to an out-of-state source also would undermine the important goals of efficiency and predictability in the permit system. The history of the 1972 amendments shows that Congress intended to establish "clear and identifiable" discharge standards. See S. Rep. No. 92–414, p. 81 (1971), 2 Leg. Hist. 1499.[16] As noted above, under the reading of the saving clause proposed by respondents, a source would be subject to a variety of common-law rules established by the different States along the interstate waterways. These nuisance standards often are "vague" and "indeterminate."[17] The application of numerous States' laws would only exacerbate the vagueness and resulting uncertainty. The Court of Appeals in *Milwaukee III* identified the problem with such an irrational system of regulation:

> "For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards

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States are required by the Act to give affected States an opportunity to be heard and a chance to comment before issuing a permit.

[16] "The citizen suit provision [§ 505] is consistent with principles underlying the . . . Act, [which are] the development of clear and identifiable requirements. Such requirements should provide manageable and precise benchmarks for performance." S. Rep. No. 92–414, p. 81 (1971), 2 Leg. Hist. 1499.

[17] See *Milwaukee II*, 451 U. S., at 317; see also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'"). The possibility that a source will have to meet a number of different standards is relatively small in this case, since Vermont is the only State that shares Lake Champlain with New York. But consider, for example, a plant that discharges effluents into the Mississippi River. A source located in Minnesota theoretically could be subject to the nuisance laws of any of the nine downstream States.

> developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless." 731 F. 2d, at 414.

It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure.

Nothing in the Act gives each affected State this power to regulate discharges. The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution. It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.

C

Our conclusion that Vermont nuisance law is inapplicable to a New York point source does not leave respondents without a remedy. The CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act. The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State. By its terms the CWA allows States such as New York to impose higher standards on their own point sources, and in *Milwaukee II* we recognized that this authority may include the right to impose higher common-law as well as higher statutory restrictions. 451 U. S., at 328 (suggesting that "States may adopt more stringent limitations . . . through state nuisance law, and apply them to in-state dischargers"); see also *Committee for Jones Falls Sewage*

System v. *Train*, 539 F. 2d 1006, 1009, and n. 9 (CA4 1976) (CWA preserves common-law suits filed in source State).[18]

An action brought against IPC under New York nuisance law would not frustrate the goals of the CWA as would a suit governed by Vermont law.[19] First, application of the source

[18] Nothing in our decision, of course, affects respondents' right to pursue remedies that may be provided by the Act. If, as was also alleged in respondents' complaint, IPC is violating the terms of its permit, respondents may bring a citizen suit to compel compliance. 33 U. S. C. § 1365. Respondents also had the opportunity to protect their interests before the fact by commenting and objecting to the proposed standard. See *Milwaukee II*, *supra*, at 326 (Act provides "ample" opportunity for affected States to protect their rights).

[19] The District Court concluded that the interference with the Act is insignificant, in part because respondents are seeking to be compensated for a specific harm rather than trying to "regulate" IPC. 602 F. Supp. 264, 271–272 (Vt. 1985). The Solicitor General, on behalf of the United States as *amicus curiae*, adopts only a portion of this view. He acknowledges that suits seeking *punitive* or *injunctive* relief under affected-state law should be pre-empted because of the interference they cause with the CWA. The Government asserts that *compensatory* damages actions, however, may be brought under the law of the State where the injury occurred. The Solicitor General reasons that compensatory damages only require the source to pay for the external costs created by the pollution, and thus do not "regulate" in a way inconsistent with the Act. The Government cites *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984), for the proposition that in certain circumstances a court may find pre-emption of some remedies and not others.

We decline the Government's invitation to draw a line between the types of relief sought. There is no suggestion of such a distinction in either the Act or the legislative history. As the Court noted in *Silkwood*, unless there is evidence that Congress meant to "split" a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is available (or as in this case, pre-empted). *Id.*, at 255. We also think it would be unwise to treat compensatory damages differently under the facts of this case. If the Vermont court determined that respondents were entitled only to the requested compensatory relief, IPC might be compelled to adopt different or additional means of pollution control from those required by the Act, regardless of whether the purpose of the relief was compensatory or regulatory. See *Perez* v. *Campbell*, 402 U. S. 637, 651–652 (1971) (effect rather than purpose of a state statute gov-

State's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Second, the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. Although New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements.[20]

IPC asks the Court to go one step further and hold that all state-law suits also must be brought in source-state *courts*. As petitioner cites little authority or justification for this position, we find no basis for holding that Vermont is an improper forum. Simply because a cause of action is pre-empted does not mean that judicial jurisdiction over the claim

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erns pre-emption analysis). As discussed, this result would be irreconcilable with the CWA's exclusive grant of authority to the Federal Government and the source State. Cf. *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 324–325 (1981).

[20] Although we conclude that New York law generally controls this suit, we note that the pre-emptive scope of the CWA necessarily includes *all* laws that are inconsistent with the "full purposes and objectives of Congress." See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 713 (1985). We therefore do not agree with the dissent that Vermont nuisance law still may apply if the New York *choice-of-law* doctrine dictates such a result. *Post*, at 507–508. As we have discussed, *supra*, the application of affected-state law would frustrate the carefully prescribed CWA regulatory system. This interference would occur, of course, whether affected-state law applies as an original matter, or whether it applies pursuant to the source State's choice-of-law principles. Therefore if, and to the extent, the law of a source State requires the application of affected-state substantive law on this particular issue, it would be pre-empted as well.

is affected as well; the Act pre-empts laws, not courts. In the absence of statutory authority to the contrary,[21] the rule is settled that a district court sitting in diversity is competent to apply the law of a foreign State.

IV

The District Court correctly denied IPC's motion for summary judgment and judgment on the pleadings. Nothing in the Act prevents a court sitting in an affected State from hearing a common-law nuisance suit, provided that jurisdiction otherwise is proper. Both the District Court and the Court of Appeals erred, however, in concluding that Vermont law governs this litigation. The application of affected-state laws would be incompatible with the Act's delegation of authority and its comprehensive regulation of water pollution. The Act pre-empts state law to the extent that the state law is applied to an out-of-state point source.

The decision of the Court of Appeals is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

I concur wholeheartedly in the Court's judgment that the Clean Water Act (Act), 33 U. S. C. § 1251 *et seq.*, does not pre-empt a private nuisance suit filed in a Vermont court when the source of the alleged injury is located in New York. I disagree only with the Court's view that a Vermont court must apply New York nuisance law.

I

The question presented is whether the District Court properly denied International Paper Company's motion to dis-

[21] Cf. 33 U. S. C. § 1365(c)(1) (citizen suit to enforce permit must be brought in judicial district where source is located).

miss. The Court concludes that a federal district court, sitting in the State where the injury occurred, may hear a common-law nuisance suit to redress interstate water pollution *and* that the district court must apply the law of the State in which the point source is located. The Court improperly reaches out to decide the latter issue. As far as the parties and the Court know, "Vermont law and New York law are identical on the question of private nuisance." Tr. of Oral Arg. 24. Moreover, Vermont is the only State to share Lake Champlain with New York. Thus, the nuisance laws of New York and Vermont are the sole candidates for application in the present case, and they do not conflict. The respondents do not base their claims on any particular state law—"[t]he Complaint in this matter does not specify the jurisdiction of the common law it invokes or make a choice of law." Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendant's Motion to Dismiss in No. 78–163, p. 4. Given these facts, I find it necessary only to affirm the denial of International Paper Company's motion to dismiss.

II

Even were I to reach the issue of the state law applicable in this case, I would not interpret the Act to require a court sitting in the State where the injury has occurred (affected State) to apply the nuisance law of the State from which the pollution emanates (source State). Nothing in the Act preempts the usual two-step analysis undertaken by federal district courts to determine which state tort law should be applied in interstate tort suits. First, the district court must apply the conflict-of-law rules of the State in which the court sits. See *Day & Zimmerman, Inc.* v. *Challoner*, 423 U. S. 3, 4 (1975); *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 496 (1941) (holding that *Erie* doctrine applies to conflict-of-law rules). Thus, the Vermont District Court should apply the conflict-of-law rules of Vermont, the affected State. Second, these conflict-of-law principles must

be interpreted by the district court to determine whether the tort law of the source State or the affected State should be applied. Today the Court finds that the application of Vermont's nuisance law is pre-empted even if Vermont's conflict-of-law rules determine that Vermont's tort law should be applied.

The Act provides no support for deviation from well-settled conflict-of-law principles. Under conflict-of-law rules, the affected State's nuisance law may be applied when the purpose of the tort law is to ensure compensation of tort victims.[1] "[I]t is beyond dispute" that affected States have "a significant interest in redressing injuries that actually occur within the State." *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 776 (1984); see also *Allstate Ins. Co.* v. *Hague*, 449 U. S. 302, 307 (1981); *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 442 (1960). This traditional interest of the affected State, involving the health and safety of its citizens, is protected by providing for application of the affected State's own tort laws in suits against the source State's polluters. See *Askew* v. *American Waterways Operators, Inc.*, 411 U. S. 325, 343 (1973); *Watson* v. *Employers Liability As-*

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[1] States have adopted two different conflict-of-law approaches to determine which state tort law should be applied. The traditional rule of *lex loci delicti* requires the application of the tort law of the jurisdiction where the injury occurred. See 19 N. Y. Jur. 2d, Conflict of Laws § 39, p. 623 (1982); E. Scoles & P. Hay, Conflict of Law § 17.7, pp. 560–561 (1982). The rationale for the traditional rule is that the affected State possesses a strong interest in redressing injuries to its citizens. The modern rule, followed by the majority of States, employs an interest-analysis approach. See *Allstate Ins. Co.* v. *Hague*, 449 U. S. 302, 309 (1981). Under this analysis, if the primary purpose of the tort rule is to control the tortfeasor's conduct—such as the setting of pollution discharge standards—then the source State's tort law may be applied. Alternatively, if the main purpose of the tort rule is compensating victims of the tort, a court may apply the affected State's tort law. Other relevant considerations include the locations of the parties and where the relationship, if any, between the parties is centered. See Restatement (Second) of Conflict of Laws § 145, and Comment *c*, pp. 414–416 (1971).

surance Corp., 348 U. S. 66, 72–73 (1954); *Young* v. *Masci*, 289 U. S. 253, 258–259 (1933). The State's interest in applying its own tort laws cannot be superseded by a federal act unless that was the clear and manifest purpose of Congress. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 248, 255 (1984); *Milwaukee* v. *Illinois*, 451 U. S. 304, 316 (1981) *(Milwaukee II)*.

Here Congress preserved the rights of source States and affected States alike to enforce state common-law claims. Section 510 provides: "Except as *expressly* provided . . . , nothing in this chapter shall . . . be construed as impairing or *in any manner affecting any right* or jurisdiction *of the States with respect to the waters (including boundary waters) of such States*." 33 U. S. C. § 1370 (emphasis added). In preserving the right to seek traditional common-law relief, the Act draws no distinction between interstate and intrastate disputes; § 505(e) states: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." § 1365(e).[2] This provision contains no "express" restriction on the normal operation of state law, reflecting the Act's policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." § 1251(b).

By contrast, where Congress wanted to affect state common-law rights, it expressly stated this intent in the Act. Congress chose to pre-empt state law "only where the situation warranted it based upon the urgent need for uniformity

[2] The Court dismisses the importance of § 505(e) because that section "merely says that '[n]othing *in this section*,' *i. e.*, the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act." *Ante*, at 493. But Congress used this language because this is the only section of the Act that expressly implicates private suits. Congress was reemphasizing that a State's authority over private suits, involving state common law, was not affected by the Act.

such as in section 312(f) relating to marine sanitation devices." H. R. Rep. No. 92–911, p. 136 (1972), 1 Legislative History of the Water Pollution Control Act of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 823 (1973) (hereinafter Leg. Hist.).

I find that the Act's plain language clearly indicates that Congress wanted to leave intact the traditional right of the affected State to apply its own tort law when its residents are injured by an out-of-state polluter.

III

The Court argues that, although the Act does not explicitly state that the affected States' laws are pre-empted here, applying the law of an affected State against an out-of-state source stands as an obstacle to the full implementation of the Act. The Court contends application of an affected State's common law is contrary to subsidiary objectives of the Act: (1) establishing the right of source States to set effluent standards for in-state polluters, *ante*, at 489–490; and (2) establishing clear and identifiable discharge standards, *ante*, at 496. The Court concludes that the affected State's common law is pre-empted by implication because of these conflicts. Although the Court plausibly argues that it is offering a better administrative approach, I do not believe that Congress meant to alter state law in this manner.

As a threshold matter, the Court's opinion assumes that in enacting the Act, Congress valued administrative efficiency more highly than effective elimination of water pollution. Yet there is no evidence that Congress ever made such a choice. Instead, the Act reflects Congress' judgment that a rational permit system, operating in tandem with existing state common-law controls, would best achieve the Act's primary goal of controlling water pollution. I base this conclusion on four important considerations.

First, since Congress preserved state common-law rights "[e]xcept as *expressly* provided," *supra*, at 503, the Court's reliance upon pre-emption by *implication* cannot justify its conclusion. Cf. *Silkwood* v. *Kerr-McGee Corp.*, *supra*, at 255 ("Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted").

Second, the legislative history of the Act indicates that Congress saw no peril to the Act in permitting the application of traditional principles of state law. The Senate Committee Report noted that Congress meant "specifically [to] preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.*" S. Rep. No. 92–414, p. 81 (1971), 2 Leg. Hist. 1499 (emphasis added). The majority's concern that tort liability might undercut permit requirements was thus not shared by Congress.

In addition, the Environmental Protection Agency's (EPA) interpretation is consistent with Congress' view that state tort remedies were supplemental and wholly preserved under the Act. The regulations promulgated by the EPA recognize that meeting the source State's minimum effluent limits does not convey "any exclusive privilege." 40 CFR § 122.5(b) (1986). The EPA did not interpret the Act to modify state or local law: "The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations." § 122.5(c).

Third, we have refused to pre-empt a State's law, even when it is contrary to subsidiary objectives concerning administration, if the State's law furthers the federal statute's primary purpose and is consistent with the Act's saving of States' authority in an area traditionally regulated by States. See *Pacific Gas & Electric Co.* v. *Energy Resources Con-*

servation and Development Comm'n, 461 U. S. 190, 221–223 (1983). Subjecting polluters to state common-law liability simultaneously promotes the main federal goal of eliminating water pollution entirely, 33 U. S. C. § 1251(a)(1), and obeys the congressional command to leave state common law intact. Here Congress intended to stand by its federal regulatory scheme and the State's traditional liability laws "and to tolerate whatever tension there was between them." *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S., at 256. "Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by States to undercut a federal objective. The courts should not assume the role which our system assigns to Congress." *Pacific Gas & Electric Co.* v. *Energy Resources Conservation and Development Comm'n*, *supra*, at 223.

Finally, the Court overstates any conflict between the affected State's nuisance law and the subsidiary objectives of the Act. The Court contends that applying the affected State's law would violate the source State's right to set effluent standards for in-state polluters. But if traditional conflict-of-law rules require the application of the affected State's nuisance law, there is no "conflict" with the source State's ability to set the *minimum* standards required under the Act. Congress considered state common-law rights to be supplementary to, and not in conflict with, the Act unless they embodied a "less stringent" standard for polluters than the federal effluent standards. See H. R. Rep. No. 92–911, pp. 169–170 (1972), 1 Leg. Hist. 856–857. The application of an affected State's common-law remedies to an out-of-state polluter does not conflict with the Act because it is possible for the polluter to redress the injuries suffered by the victims of the pollution and to obey the source State's effluent standards. By complying with the most stringent requirement—either under the Act or the affected State's law—the polluter necessarily complies with the more lenient standards. See *Silkwood* v. *Kerr-McGee Corp.*, *supra*, at 257.

The Court also argues that application of an affected State's law to an out-of-state source would undermine the important goals of efficiency and predictability in the permit system. But Congress set out to establish "clear and identifiable" discharge standards, S. Rep. No. 92–414, p. 81 (1971), 2 Leg. Hist. 1499; it did not intend to reform the "impenetrable jungle" of state nuisance law, see *ante*, at 496, n. 17. As both legislative history and EPA regulations indicate, compliance with effluent standards is not a defense to state tort suits, see *ante*, at 496, and the affected State's nuisance law is no more "vague" and "indeterminate" than the source State's nuisance law. In fact, in the instant case, Vermont and New York nuisance law are apparently identical. See *supra*, at 501. While Congress intended to impose identifiable federal discharge standards upon polluters, we must have much more explicit evidence before assuming that in enacting such a provision Congress meant to revolutionize state conflict-of-law or tort law principles.

IV

Even if the Court's conclusion that New York *law* should apply is correct, it does not logically follow that New York *nuisance law* must be applied in this case. In its haste to reach this result, the Court assumes that the imposition of the New York nuisance standard would be required by New York law in a suit where the alleged injury occurred in Vermont: "Because the Act specifically allows source States to impose stricter standards, the imposition of source-state *law* does not disrupt the regulatory partnership established by the permit system. . . . New York *nuisance law* may impose separate standards . . . ." *Ante*, at 499 (emphasis added).

Whether New York law requires the application of New York or Vermont nuisance law depends on an interpretation

of New York law *pertaining to conflict of laws*.[3] "A state has the same freedom to adopt its own rules of Conflict of Laws as it has to adopt any other rules of law. Conflict of Laws rules, when adopted, become as definitely a part of the law as any other branch of the state's law." Restatement (Second) of Conflict of Laws § 5, Comment *a*, p. 9 (1971). The Court reasons that a source State must have the primary role in regulating its own pollution discharges. Under this logic, nothing prevents a source State's legislature or courts from choosing to impose, under conflict-of-law principles, the affected State's nuisance law in a case such as this. A source State is free to adopt an affected State's standards as its own standards, *ante*, at 490 (noting that source State can accept advice of affected State).

The District Court correctly denied the petitioner's motion for summary judgment and judgment on the pleadings. For the reasons indicated above, I would affirm without reaching the question of the state law applicable in this case.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in part and dissenting in part.

In affirming the denial of International Paper Company's motion to dismiss, the Court concludes that nothing in the

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[3] The respondents contend that under both New York and Vermont conflict-of-law principles, Vermont common law would apply to this action. Brief for Respondents 12. Petitioner does not contest this view. If this issue need be determined, it should, in my view, be remanded to the Court of Appeals. See, *e. g.*, *Allstate Ins. Co.* v. *Hague*, 449 U. S., at 307; *Day & Zimmerman, Inc.* v. *Challoner*, 423 U. S. 3, 5 (1975) (BLACKMUN, J., concurring); *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 492 (1941). It is sufficient for the sake of argument to note that several cases suggest that New York conflict-of-law principles may require that Vermont law be applied in this instance. See, *e. g.*, *Bing* v. *Halstead*, 495 F. Supp. 517, 520 (SDNY 1980) ("Where tortious conduct occurs in one jurisdiction and injury in another, as is the case here, the law of the place of injury applies"); *Cousins* v. *Instrument Flyers, Inc.*, 44 N. Y. 2d 698, 699, 376 N. E. 2d 914, 915 (1978) ("It is true that *lex loci delicti* remains the general rule in tort cases to be displaced only in extraordinary circumstances").

Clean Water Act, 33 U. S. C. § 1251 *et seq.*, deprives a Federal District Court of the diversity jurisdiction it would otherwise have to entertain a common-law nuisance suit brought against a point source located in another State and based on an injury allegedly suffered in the forum State. I agree with that holding and find it sufficient to decide this case.

The Court, however, goes further and ventures its opinion on whether the District Court must apply the substantive law of the State in which the source of water pollution is located. Perhaps the Court is responding to the District Court's observation, affirmed by the Court of Appeals, that the Clean Water Act "authorizes actions to redress injury caused by water pollution of interstate waters under the common law of the state in which the injury occurred." 602 F. Supp. 264, 274 (Vt. 1985). But since the District Court has not yet been asked to decide—or decided—which substantive law will govern this particular suit, there is no dispute between the parties on this issue and the Court has no business discussing it at this stage of the litigation. In its rush to express the opinion that the substantive law of the source State must govern, the Court broadly asserts that "[t]he Act preempts state law to the extent that the state law is applied to an out-of-state point source." *Ante*, at 500. But on this record, the Court does not even know whether Vermont state law, including its choice-of-law rules, would look to the New York law of nuisance to govern a nuisance suit based on an alleged source in New York.

The Court's opinion is thus partially advisory for three reasons. The question of the applicable state law it addresses has not yet arisen in this litigation; when it does arise, the District Court may well conclude that Vermont's choice-of-law rules require it to apply New York's substantive law; and, as JUSTICE BRENNAN points out, *ante*, at 501, there is no reason to believe that there is any difference between the relevant New York and Vermont law in any event. One cannot help but wonder what has happened to the once respected doctrine of judicial restraint. Just as this Court does not sit

to edit the opinions of lower courts, see *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 823 (1985) (STEVENS, J., concurring in part and dissenting in part), it also does not sit to draft advisory opinions for the possible future guidance of other courts. I therefore respectfully dissent from that part of the Court's opinion holding that the Clean Water Act requires the District Court to apply the nuisance law of the source State.

WIMBERLY *v.* LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI

CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 85–129. Argued December 9, 1986—Decided January 21, 1987

Petitioner, who had been on pregnancy leave from her employment pursuant to the employer's policy that she would be rehired only if a position was available when she was ready to return to work, was told when she notified the employer that she wanted to return to work that there were no positions open. She then filed a claim for unemployment benefits with the Missouri Division of Employment Security, which denied the claim pursuant to a Missouri statute that disqualifies a claimant who "has left his work voluntarily without good cause attributable to his work or to his employer." After the denial was upheld on administrative appeal, petitioner sought review in a Missouri Circuit Court, which held that the Missouri statute was inconsistent with the Federal Unemployment Tax Act, 26 U. S. C. § 3304(a)(12). The federal statute provides that no State, such as Missouri, participating in the federal-state unemployment compensation program shall deny any compensation "solely on the basis of pregnancy or termination of pregnancy." The Missouri Court of Appeals affirmed, but the Missouri Supreme Court reversed.

Held: The Missouri statute is consistent with the federal statute. The plain import of § 3304(a)(12)'s language is that Congress intended only to prohibit States from singling out pregnancy for unfavorable treatment and not to mandate preferential treatment. This is confirmed by both the legislative history and the Labor Department's interpretation of the statute. The focus of the statutory language is on the State's treatment of pregnancy, not the claimant's reason for leaving her job. To apply the Missouri statute, under which *all* persons who leave work for reasons not causally connected to the work or the employer are disqualified from receiving benefits, it is not necessary to know that petitioner left because of pregnancy. All that is relevant is that she stopped work for a reason having no causal connection to her work or her employer. Under the State's unemployment compensation scheme, pregnancy was not the "sole basis" for the decision under a natural reading of § 3304(a)(12)'s language. Pp. 514–522.

688 S. W. 2d 344, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which all other Members joined, except BLACKMUN, J., who took no part in the decision of the case.

Julie S. Levin argued the cause and filed briefs for petitioner.

Michael L. Boicourt, Assistant Attorney General of Missouri, argued the cause for respondents. With him on the brief were *William L. Webster*, Attorney General, and *Sharon A. Willis*.

Christopher J. Wright argued the cause and filed a brief for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Ayer, John F. Cordes, Marleigh D. Dover, George R. Salem, Allen H. Feldman, Carol A. De Deo, Barbara J. Johnson*, and *Jeffrey A. Hennemuth.**

JUSTICE O'CONNOR delivered the opinion of the Court.

The Missouri Supreme Court concluded that the Federal Unemployment Tax Act, 26 U. S. C. § 3304(a)(12), does not prohibit a State from disqualifying unemployment compensation claimants who leave their jobs because of pregnancy, when the State imposes the same disqualification on all claimants who leave their jobs for a reason not causally connected to their work or their employer. 688 S. W. 2d 344 (1985). We granted certiorari, 475 U. S. 1118 (1986), because the court's decision conflicts with that of the Court of Appeals for the Fourth Circuit in *Brown* v. *Porcher*, 660 F. 2d 1001 (1981), cert. denied, 459 U. S. 1150 (1983), on a question of practical significance in the administration of state unemployment compensation laws.

I

In August 1980, after having been employed by the J. C. Penney Company for approximately three years, petitioner requested a leave of absence on account of her pregnancy.

**Judith E. Kurtz* and *Lorraine L. Loder* filed a brief for Equal Rights Advocates et al. as *amici curiae* urging reversal.

Joan E. Bertin and *Isabelle Katz Pinzler* filed a brief for the American Civil Liberties Union et al. as *amici curiae*.

Pursuant to its established policy, the J. C. Penney Company granted petitioner a "leave without guarantee of reinstatement," meaning that petitioner would be rehired only if a position was available when petitioner was ready to return to work. Petitioner's child was born on November 5, 1980. On December 1, 1980, when petitioner notified J. C. Penney that she wished to return to work, she was told that there were no positions open.

Petitioner then filed a claim for unemployment benefits. The claim was denied by the Division of Employment Security (Division) pursuant to Mo. Rev. Stat. § 288.050.1(1) (Supp. 1984), which disqualifies a claimant who "has left his work voluntarily without good cause attributable to his work or to his employer." A deputy for the Division determined that petitioner had "quit because of pregnancy," App. to Pet. for Cert. A53, and therefore had left work "voluntarily and without good cause attributable to [her] work or to [her] employer." *Id.*, at A52. Petitioner appealed the decision to the Division's appeals tribunal, which, after a full evidentiary hearing, entered findings of fact and conclusions of law affirming the deputy's decision. The Labor and Industrial Relations Commission denied petitioner's petition for review.

Petitioner then sought review in the Circuit Court of Jackson County, Missouri. The court concluded that § 288.050.1(1) was inconsistent with 26 U. S. C. § 3304(a)(12) as construed in *Brown* v. *Porcher*, *supra*, and therefore could not be enforced. Following *Brown*, the Circuit Court held that § 3304(a)(12) "banned the use of pregnancy or its termination as an excuse for denying benefits to otherwise eligible women," App. to Pet. for Cert. A44, and accordingly reversed the Commission's decision and remanded for entry of an award. The Missouri Court of Appeals affirmed. Although the Court of Appeals expressed "reservations concerning the soundness of the ruling in *Brown*," *id.*, at A39, it

felt constrained to follow the Fourth Circuit's construction of § 3304(a)(12).

The Missouri Supreme Court reversed, with three judges dissenting. The court held that previous state appellate decisions had correctly interpreted Mo. Rev. Stat. § 288.050.1(1) (Supp. 1984) as disqualifying all claimants who, like petitioner, leave work "for reasons that, while perhaps legitimate and necessary from a personal standpoint, were not causally connected to the claimant's work or employer." 688 S. W. 2d, at 346. Rejecting the notion that it was bound by *Brown* v. *Porcher*, *supra*, the court determined that § 288.050.1(1) was consistent with the federal statute. The court held that the plain language of § 3304(a)(12) only prohibits state laws from singling out pregnancy for unfavorable treatment. The Missouri scheme does not conflict with this requirement, the court found, because the state law does not expressly refer to pregnancy; rather, benefits are denied only when claimants leave work for reasons not attributable to the employer or connected with the work. The court noted that the Department of Labor, the agency charged with enforcing the statute, consistently has viewed § 3304(a)(12) as prohibiting discrimination rather than mandating preferential treatment. We now affirm.

II

The Federal Unemployment Tax Act (Act), 26 U. S. C. § 3301 *et seq.*, enacted originally as Title IX of the Social Security Act in 1935, 49 Stat. 639, envisions a cooperative federal-state program of benefits to unemployed workers. See *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772, 775 (1981). The Act establishes certain minimum federal standards that a State must satisfy in order for a State to participate in the program. See 26 U. S. C. § 3304(a). The standard at issue in this case, § 3304(a)(12), mandates that "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy."

Apart from the minimum standards reflected in § 3304(a), the Act leaves to state discretion the rules governing the administration of unemployment compensation programs. See *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937). State programs, therefore, vary in their treatment of the distribution of unemployment benefits, although all require a claimant to satisfy some version of a three-part test. First, all States require claimants to earn a specified amount of wages or to work a specified number of weeks in covered employment during a 1-year base period in order to be entitled to receive benefits. Second, all States require claimants to be "eligible" for benefits, that is, they must be able to work and available for work. Third, claimants who satisfy these requirements may be "disqualified" for reasons set forth in state law. The most common reasons for disqualification under state unemployment compensation laws are voluntarily leaving the job without good cause, being discharged for misconduct, and refusing suitable work. See Brief for United States as *Amicus Curiae* 2–3; Note, Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act, 82 Mich. L. Rev. 1925, 1928–1929 (1984).

The treatment of pregnancy-related terminations is a matter of considerable disparity among the States. Most States regard leave on account of pregnancy as a voluntary termination for good cause. Some of these States have specific statutory provisions enumerating pregnancy-motivated termination as good cause for leaving a job, while others, by judicial or administrative decision, treat pregnancy as encompassed within larger categories of good cause such as illness or compelling personal reasons.[1] A few States, however,

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[1] States with statutory provisions that specifically treat pregnancy as good cause for leaving work include Arkansas, South Dakota, and Tennessee. See Ark. Stat. Ann. § 81–1106(a) (1976 and Supp. 1985); S. D. Codified Laws § 61–6–3 (1978); Tenn. Code Ann. § 50–7–303(a)(1) (Supp. 1986). For an example of a State that has reached the same result by adminis-

like Missouri, have chosen to define "leaving for good cause" narrowly.[2] In these States, all persons who leave their jobs are disqualified from receiving benefits unless they leave for reasons directly attributable to the work or to the employer.

Petitioner does not dispute that the Missouri scheme treats pregnant women the same as all other persons who leave for reasons not causally connected to their work or their employer, including those suffering from other types of temporary disabilities. Tr. of Oral Arg. 8. See *Fifer* v. *Missouri Division of Employment Security*, 665 S. W. 2d 81 (Mo. App. 1984); *Duffy* v. *Labor and Industrial Relations Comm'n*, 556 S. W. 2d 195 (Mo. App. 1977). She contends, however, that § 3304(a)(12) is not simply an antidiscrimination statute, but rather that it mandates preferential treatment for women who leave work because of pregnancy. According to petitioner, § 3304(a)(12) affirmatively requires States to provide unemployment benefits to women who leave work because of pregnancy when they are next available and able to work, regardless of the State's treatment of other similarly situated claimants. See Brief for Petitioner 19–25.

Contrary to petitioner's assertions, the plain import of the language of § 3304(a)(12) is that Congress intended only to prohibit States from singling out pregnancy for unfavorable treatment. The text of the statute provides that compensation shall not be denied under state law "solely on the basis of pregnancy." The focus of this language is on the basis for the State's decision, not the claimant's reason for leaving her job. Thus, a State could not decide to deny benefits to pregnant women while at the same time allowing benefits to persons who are in other respects similarly situated: the "sole basis" for such a decision would be on account of pregnancy.

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trative determination, see Cal. Admin. Code, Tit. 22, § 1256–15(b), reprinted in 2 CCH Unempl. Ins. Rep. ¶ 5219 O (Apr. 8, 1982).

[2] See, *e. g.*, Okla. Stat., Tit. 40, §§ 2–404, 2–405 (1981); Vt. Stat. Ann., Tit. 21, § 1344(a)(3) (1978 and Supp. 1986).

On the other hand, if a State adopts a neutral rule that incidentally disqualifies pregnant or formerly pregnant claimants as part of a larger group, the neutral application of that rule cannot readily be characterized as a decision made "solely on the basis of pregnancy." For example, under Missouri law, *all* persons who leave work for reasons not causally connected to the work or the employer are disqualified from receiving benefits. To apply this law, it is not necessary to know that petitioner left because of pregnancy: all that is relevant is that she stopped work for a reason bearing no causal connection to her work or her employer. Because the State's decision could have been made without ever knowing that petitioner had been pregnant, pregnancy was not the "sole basis" for the decision under a natural reading of § 3304(a)(12)'s language.

We have, on other occasions, construed language similar to that in § 3304(a)(12) as prohibiting disadvantageous treatment, rather than as mandating preferential treatment. In *Monroe* v. *Standard Oil Co.*, 452 U. S. 549 (1981), for example, the Court considered 38 U. S. C. § 2021(b)(3), a provision of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, which provides that a person "shall not be denied retention in employment . . . because of any obligation" as a member of the Nation's Reserve Forces. The *Monroe* Court concluded that the intent of the provision was to afford reservists "the same treatment afforded their co-workers without military obligations," 452 U. S., at 560; it did not create an "employer responsibility to provide preferential treatment." *Id.*, at 562. Similarly, in *Southeastern Community College* v. *Davis*, 442 U. S. 397 (1979), we considered § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794, which provides that an "otherwise qualified handicapped individual" shall not be excluded from a federally funded program "solely by reason of his handicap." We concluded that the statutory language was only intended to "eliminate discrimination against otherwise qualified individuals," and generally did

not mandate "affirmative efforts to overcome the disabilities caused by handicaps." 442 U. S., at 410.

Even petitioner concedes that § 3304(a)(12) does not prohibit States from denying benefits to pregnant or formerly pregnant women who fail to satisfy neutral eligibility requirements such as ability to work and availability for work. See Brief for Petitioner 24. See also S. Rep. No. 94–1265, p. 21 (1976) ("Pregnant individuals would . . . continue to be required to meet generally applicable criteria of availability for work and ability to work"); H. R. Rep. No. 94–755, p. 50 (1975). Nevertheless, she contends that the statute prohibits the application to pregnant women of neutral *disqualification* provisions. Reply Brief for Petitioner 8–9. But the statute's plain language will not support the distinction petitioner attempts to draw. The statute does not extend only to disqualification rules. It applies, by its own terms, to any decision to deny compensation. In both instances, the scope of the statutory mandate is the same: the State cannot single out pregnancy for disadvantageous treatment, but it is not compelled to afford preferential treatment.

The legislative history cited by petitioner does not support her view that § 3304(a)(12) mandates preferential treatment for women on account of pregnancy. Petitioner contends that § 3304(a)(12) as originally drafted was only an antidiscrimination statute, but that the statute in its final form reaches more broadly. The original version of § 3304(a)(12) provided:

> "[N]o person shall be denied compensation under such State law solely on the basis of pregnancy *and determinations under any provision of such State law relating to voluntary termination of employment, availability for work, active search for work, or refusal to accept work shall not be made in a manner which discriminates on the basis of pregnancy.*" S. 2079, 94th Cong., 1st Sess., § 8(a) (1975); H. R. 8366, 94th Cong., 1st Sess., § 8(a) (1975) (emphasis added).

According to petitioner, the deletion of the emphasized language, particularly the reference to "discrimination," manifests congressional intent to transform the scope of the statute. But petitioner can point to nothing in the legislative history that would support the view that Congress intended such a dramatic change. It is difficult to see how the deletion of language after the conjunctive "and" could *expand* the scope of the statute, when what was to become the final version of § 3304(a)(12) already was present, essentially in its entirety, in the first clause of the original bill. Indeed, however the first phrase is interpreted—either to ban discrimination or to mandate preference—the additional antidiscrimination language would have been superfluous. We conclude that Congress intended simply to eliminate a lengthy and redundant phrase, without intending to change the meaning of the provision. This explains Congress' silence on the question, without violating either logic or language.

Petitioner's reliance upon other portions of the legislative history also is unavailing. As petitioner notes, the House Report on the bill containing the language now found in § 3304(a)(12) refers to "nineteen states" that had "special disqualification provisions pertaining to pregnancy." H. R. Rep. No. 94–755, at 7. The Report goes on to observe that "[s]everal of these provisions hold pregnant women unable to work and unavailable for work; the remainder disqualify a claimant because she left work on account of her condition or because her unemployment is a result of pregnancy." *Ibid.* Although the Report does not specify which 19 States had "special disqualification provisions pertaining to pregnancy," the parties agree that Congress most probably was referring to the 19 States listed in a program letter issued by the Department of Labor a week before the Committee Report was filed. See Unemployment Insurance Program Letter No. 33–75 (Dec. 8, 1975). In that letter, the agency called for the repeal of state laws which "still include special disqualifications for pregnancy or automatically consider un-

available for work any pregnant claimant." *Id.*, at 2. In an attached summary, the letter discussed the statutory provisions of 19 States relating to pregnancy.

Neither Missouri nor any State with a rule like Missouri's is included in the list of 19 States having special disqualification provisions pertaining to pregnancy. The summary includes only state provisions that disqualify women from receiving unemployment compensation for a defined period around the date of childbirth (the kind of provision at issue in *Turner* v. *Department of Employment Security of Utah*, 423 U. S. 44 (1975)); provisions that specifically disqualify women who leave work because of pregnancy; and miscellaneous provisions that otherwise single out pregnancy for disadvantageous treatment. Petitioner argues that the Department omitted States with neutral disqualification provisions because "their policies were not apparent from their statutes." Brief for Petitioner 24. But Missouri does not have a "policy" specifically relating to pregnancy: it neutrally disqualifies workers who leave their jobs for reasons unrelated to their employment. The focus of the House Report clearly was on "*discriminatory* disqualifications because of pregnancy," H. R. Rep. No. 94–755, at 50 (emphasis added); there is no hint in the House Report of any disagreement with state provisions that neutrally disqualify workers who leave their jobs for reasons unrelated to their employment.

The Senate Report also focuses exclusively on state rules that single out pregnant women for disadvantageous treatment. In *Turner* v. *Department of Employment Security*, *supra*, this Court struck down on due process grounds a Utah statute providing that a woman was disqualified for 12 weeks before the expected date of childbirth and for 6 weeks after childbirth, even if she left work for reasons unrelated to pregnancy. The Senate Report used the provision at issue in *Turner* as representative of the kind of rule that § 3304(a)(12) was intended to prohibit:

> "In a number of States, an individual whose unemployment is related to pregnancy is barred from receiving any unemployment benefits. In 1975 the Supreme Court found a *provision of this type* in the Utah unemployment compensation statute to be unconstitutional. . . . A number of other States have similar provisions although most appear to involve somewhat shorter periods of disqualification." S. Rep. No. 94–1265, at 19, 21 (emphasis added).

In short, petitioner can point to nothing in the Committee Reports, or elsewhere in the statute's legislative history, that evidences congressional intent to mandate preferential treatment for women on account of pregnancy. There is no hint that Congress disapproved of, much less intended to prohibit, a neutral rule such as Missouri's. Indeed, the legislative history shows that Congress was focused only on the issue addressed by the plain language of § 3304(a)(12): prohibiting rules that single out pregnant women or formerly pregnant women for disadvantageous treatment.

Finally, the Department of Labor's interpretation of § 3304(a)(12) supports the holding of the Missouri Supreme Court. Shortly after the enactment of § 3304(a)(12), the agency distributed instructions to the States regarding the implementation of its terms. Petitioner emphasizes that the instructions state, in part: "A number of State laws deny benefits for causes related to pregnancy. These provisions are inequitable in that benefits are denied regardless of whether or not the individual is able and available for work and otherwise eligible." United States Department of Labor, Employment and Training Administration, Unemployment Insurance Service, Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976—P. L. 94–556, p. 62 (undated 1976). If there is any ambiguity in these sentences, the balance of the communication clearly establishes that the agency viewed § 3304(a)(12) as an antidiscrimination provision:

> "The new provision requires that the entitlement to benefits of pregnant claimants be determined on the same basis and under the same provisions applicable to all other claimants. It does not mean that pregnant claimants are entitled to benefits without meeting the requirements of the law for the receipt of benefits. It requires only that a pregnant claimant not be treated differently under the law from any other unemployed individual and that benefits be paid or denied not on the basis of pregnancy but on the basis of whether she meets the statute's conditions for receipt of benefits." *Ibid.*

The agency reiterated this view in a later communication to the States, stating that § 3304(a)(12) "does not speak to treating pregnant claimants more favorably. It only requires that they not be disqualified solely on the basis of pregnancy or its termination." United States Department of Labor, Employment and Training Administration, Unemployment Insurance Service, Supplement No. 1—Questions and Answers Supplementing Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976—P. L. 94–566, p. 26 (Dec. 7, 1976). Since then the agency has adhered to the same view. See Brief for United States as *Amicus Curiae* 27–28. Thus, the agency's interpretation of the statute, like its legislative history, confirms what is clear from the statute's plain language: that § 3304(a)(12) prohibits discrimination but does not mandate preferential treatment.

Because § 3304(a)(12) does not require States to afford preferential treatment to women on account of pregnancy, the judgment of the Missouri Supreme Court is affirmed.

It is so ordered.

JUSTICE BLACKMUN took no part in the decision of this case.

CONNECTICUT *v.* BARRETT

CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

No. 85–899. Argued December 9, 1986—Decided January 27, 1987

Respondent, while in custody on suspicion of sexual assault, was three times advised by the police of his *Miranda* rights. On each occasion, after signing and dating an acknowledgment that he had been given those rights, respondent indicated to the police that he would not make a written statement, but that he was willing to talk about the incident that led to his arrest. On the second and third such occasions, he added that he would not make a written statement outside the presence of counsel, and then orally admitted his involvement in the sexual assault. One of the police officers reduced to writing his recollection of respondent's last such statement, and the confession was introduced into evidence at respondent's trial. The trial court refused to suppress the confession, finding that respondent had fully understood the *Miranda* warnings and had voluntarily waived his right to counsel. Respondent's conviction of sexual assault, *inter alia*, was reversed by the Connecticut Supreme Court which held that his expressed desire for counsel before making a written statement constituted an invocation of his right to counsel for all purposes, that he had not waived that right by initiating further discussion with the police, and that therefore the incriminating statement was improperly admitted into evidence under *Edwards* v. *Arizona*, 451 U. S. 477.

Held: The Constitution did not require suppression of respondent's incriminating statement. Pp. 527–530.

(a) Respondent's statements to the police made clear his willingness to talk about the sexual assault, and, there being no evidence that he was "threatened, tricked, or cajoled" into speaking to the police, the trial court properly found that his decision to do so constituted a voluntary waiver of his right to counsel. Although the *Miranda* rules were designed to protect defendants from being compelled by the government to make statements, they also give defendants the right to choose between speech and silence. Pp. 527–529.

(b) Respondent's invocation of his right to counsel was limited by its terms to the making of written statements, and did not prohibit all further discussion with police. Requests for counsel must be given broad, all-inclusive effect only when the defendant's words, understood as ordinary people would understand them, are ambiguous. Here, respondent

clearly and unequivocally expressed his willingness to speak to police about the sexual assault. Pp. 529–530.

(c) The distinction drawn by respondent between oral and written statements did not indicate an understanding so incomplete as to render his limited invocation of the right to counsel effective for all purposes. To so hold would contravene his testimony, and the trial court's finding, that he fully understood his *Miranda* warnings, including the warning that anything he said to police could be used against him. A defendant's ignorance of the full consequences of his decisions does not vitiate their voluntariness. P. 530.

197 Conn. 50, 495 A. 2d 1044, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 530. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 536.

Julia DiCocco Dewey, Assistant State's Attorney of Connecticut, argued the cause and filed a brief for petitioner.

Charles A. Rothfeld argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Bryson*.

Robert L. Genuario argued the cause for respondent. With him on the brief was *John F. Kavanewsky, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Alaska et al. by *David Crump* and by the Attorneys General for their respective States as follows: *Harold M. Brown* of Alaska, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *John K. Van de Kamp* of California, *Duane Woodard* of Colorado, *James T. Jones* of Idaho, *Linley E. Pearson* of Indiana, *David L. Armstrong* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Edwin L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Lacy H. Thornburg* of North Carolina, *LeRoy S. Zimmerman* of Pennsylvania, *T. Travis Medlock* of South Carolina, *Mark V. Meierhenry* of South Dakota, *Mary Sue Terry* of Virginia, *Kenneth O. Eikenberry* of Washington, and *Bronson C. La Follette* of Wisconsin; and for the National District Attorneys Association by *Robert S. Marsel*, *Jack E. Yelverton*, and *James P. Manak*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent William Barrett was convicted after a jury trial of sexual assault, unlawful restraint, and possession of a controlled substance. The Connecticut Supreme Court reversed the convictions. It held that incriminating statements made by Barrett should have been suppressed under our decision in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), because Barrett, though stating his willingness to speak to police, had indicated that he would not make a written statement outside the presence of counsel. 197 Conn. 50, 495 A. 2d 1044 (1985). We granted certiorari to consider the federal constitutional issues presented by this holding. 476 U. S. 1114 (1986). We reverse.

In the early morning of October 24, 1980, Barrett was transported from New Haven, Connecticut, to Wallingford, where he was a suspect in a sexual assault that had occurred the previous evening. Upon arrival at the Wallingford police station, Officer Peter Cameron advised Barrett of his rights, and Barrett signed and dated an acknowledgment that he had received the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Barrett stated that "he would not give the police any written statements but he had no problem in talking about the incident." App. 12A.

Approximately 30 minutes later, Barrett was questioned by Officer Cameron and Officer John Genovese. Before this questioning, he was again advised of his *Miranda* rights and signed a card acknowledging that he had been read the rights. Respondent stated that he understood his rights, and told the officers that he would not give a written statement unless his attorney was present but had "no problem" talking about the incident. *Id.*, at 21A. Barrett then gave an oral statement admitting his involvement in the sexual assault.

After discovering that a tape recorder used to preserve the statement had malfunctioned, the police conducted a second

interview. For the third time, Barrett was advised of his *Miranda* rights by the Wallingford police, and once again stated that "he was willing to talk about [the incident] verbally but he did not want to put anything in writing until his attorney came." *Id.*, at 44A. He then repeated to the police his confession regarding the previous evening's events.

When the officers discovered that their tape recorder had again failed to record the statement, Officer Cameron reduced to writing his recollection of respondent's statement.

The trial court, after a suppression hearing, held that the confession was admissible. It found that respondent not only indicated that he understood the warnings, but also "offered the statements that he did not need anything explained to him because he understood. So it was not merely a passive acquiescence . . . ." *Id.*, at 70A. Barrett's decision to make no written statement without his attorney "indicate[d] to the Court that he certainly understood from having his rights read to him that . . . he was under no obligation to give any statement." *Ibid.* The court held that Barrett had voluntarily waived his right to counsel and thus allowed testimony at trial as to the content of Barrett's statement. Barrett took the stand in his own defense and testified that he had understood his rights as they were read to him. *Id.*, at 130A. He was convicted and sentenced to a prison term of 9 to 18 years.

The Connecticut Supreme Court reversed the conviction, holding that respondent had invoked his right to counsel by refusing to make written statements without the presence of his attorney. In the court's view, Barrett's expressed desire for counsel before making a written statement served as an invocation of the right for all purposes:

> "The fact that the defendant attached his request for counsel to the making of a written statement does not affect the outcome of . . . our inquiry. No particular form of words has ever been required to trigger an individual's fifth amendment protections; nor have requests for

> counsel been narrowly construed. The defendant's refusal to give a written statement without his attorney present was a clear request for the assistance of counsel to protect his rights in his dealings with the police. Such a request continues to be constitutionally effective despite the defendant's willingness to make oral statements. We conclude, therefore, that the defendant did invoke his right to counsel under the fifth and fourteenth amendments." 197 Conn., at 57, 495 A. 2d, at 1049 (citations omitted).

This invocation, the court believed, brought the case within what it called the "bright-line rule for establishing a waiver of this right." *Id.*, at 58, 495 A. 2d, at 1049. That rule requires a finding that the suspect "(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith* v. *Illinois*, 469 U. S. 91, 95 (1984) *(per curiam)*. See also *Edwards*, *supra*, at 485, 486, n. 9. Because Barrett had not initiated further discussions with police, the court found his statement improperly admitted.

We think that the Connecticut Supreme Court erred in holding that the United States Constitution required suppression of Barrett's statement. Barrett made clear to police his willingness to talk about the crime for which he was a suspect. The trial court found that this decision was a voluntary waiver of his rights, and there is no evidence that Barrett was "threatened, tricked, or cajoled" into this waiver. *Miranda*, 384 U. S., at 476. The Connecticut Supreme Court nevertheless held as a matter of law[1] that respond-

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[1] The Connecticut Supreme Court noted in its opinion that the trial court "impliedly found that the defendant had requested counsel." 197 Conn. 50, 56, 495 A. 2d 1044, 1048 (1985). This statement does not suggest, however, that the request for counsel was in fact all-inclusive, and the Supreme Court expressly noted the trial court's finding that defendant had refused to give a written statement without his attorney present. *Id.*, at 56, n. 6, 495 A. 2d, at 1048, n. 6. The holding that Barrett had invoked his right to

ent's limited invocation of his right to counsel prohibited all interrogation absent initiation of further discussion by Barrett. Nothing in our decisions, however, or in the rationale of *Miranda*, requires authorities to ignore the tenor or sense of a defendant's response to these warnings.

The fundamental purpose of the Court's decision in *Miranda* was "to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process." *Id.*, at 469 (emphasis added). See also *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986) ("*Miranda* attempted to reconcile [competing] concerns by giving the *defendant* the power to exert some control over the course of the interrogation") (emphasis in original); *Oregon* v. *Elstad*, 470 U. S. 298, 308 (1985) ("Once warned, the suspect is free to exercise *his own volition* in deciding whether or not to make a statement to the authorities") (emphasis added). To this end, the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights from the government "compulsion, subtle or otherwise," that "operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." *Miranda*, *supra*, at 474. See also *Smith*, *supra*, at 98; *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983). One such rule requires that, once the accused "states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda*, *supra*, at 474. See also *Edwards*, 451 U. S., at 484. It remains clear, however, that this prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose. See *New York* v. *Quarles*, 467 U. S. 649, 654 (1984). By prohibiting further interrogation after the invocation of these rights, we erect an auxiliary barrier against police coercion.

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counsel, then, rests on a legal conclusion about the effect of his limited invocation rather than on a factual finding.

But we know of no constitutional objective that would be served by suppression in this case. It is undisputed that Barrett desired the presence of counsel before making a written statement. Had the police obtained such a statement without meeting the waiver standards of *Edwards*, it would clearly be inadmissible.[2] Barrett's limited requests for counsel, however, were accompanied by affirmative announcements of his willingness to speak with the authorities. The fact that officials took the opportunity provided by Barrett to obtain an oral confession is quite consistent with the Fifth Amendment. *Miranda* gives the defendant a right to choose between speech and silence, and Barrett chose to speak.

The Connecticut Supreme Court's decision to the contrary rested on the view that requests for counsel are not to be narrowly construed. 197 Conn., at 57, 495 A. 2d, at 1049. In support of this premise, respondent observes that our prior decisions have given broad effect to requests for counsel that were less than all-inclusive. See *Bradshaw*, *supra*, at 1041–1042 ("I do want an attorney before it goes very much further"); *Edwards*, *supra*, at 479 ("I want an attorney before making a deal"). We do not denigrate the "settled approach to questions of waiver [that] requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel," *Michigan* v. *Jackson*, 475 U. S. 625, 633 (1986), when we observe that this approach does little to aid respondent's cause. Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous. Here, however, Barrett made clear his intentions, and they were honored by police.[3] To conclude that respondent invoked his right to

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[2] Because the attempts to record Barrett's statements were unsuccessful, we have no occasion to consider whether the result would be different if police had taped the statements and used the recording against Barrett.

[3] Since we reject the claim that Barrett's statements represent an ambiguous or equivocal response to the *Miranda* warnings, there is no

counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement.

We also reject the contention that the distinction drawn by Barrett between oral and written statements indicates an understanding of the consequences so incomplete that we should deem his limited invocation of the right to counsel effective for all purposes. This suggestion ignores Barrett's testimony—and the finding of the trial court not questioned by the Connecticut Supreme Court—that respondent fully understood the *Miranda* warnings. These warnings, of course, made clear to Barrett that "[i]f you talk to any police officers, anything you say can and will be used against you in court." App. at 48A. The fact that some might find Barrett's decision illogical[4] is irrelevant, for we have never "embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *Elstad*, *supra*, at 316; *Colorado* v. *Spring*, *post*, p. 564.

For the reasons stated, the judgment of the Connecticut Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, concurring in the judgment.

I concur in the judgment that the Constitution does not require the suppression of Barrett's statements to the police, but for reasons different from those set forth in the opinion of the Court. Barrett's contemporaneous waiver of his right to silence and limited invocation of his right to counsel (for the

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need for us to address the question left open in *Smith* v. *Illinois*, 469 U. S. 91, 96, n. 3 (1984) *(per curiam)*.

[4] We do not suggest that the distinction drawn by Barrett is in fact illogical, for there may be several strategic reasons why a defendant willing to speak to the police would still refuse to write out his answers to questions, or to sign a transcript of his answers prepared by the police, a statement that may be used against him.

purpose of making a written statement) suggested that he did not understand that anything he *said* could be used against him. However, the State eliminated this apparent ambiguity when it demonstrated that Barrett's waiver of his right to silence was voluntary, knowing, and intelligent. Barrett testified at trial that he understood his *Miranda* rights, *i. e.*, he knew that he need not talk to the police without a lawyer present and that anything he said could be used against him. Under these circumstances, the waiver of the right to silence and the limited invocation of the right to counsel were valid.

I

In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court held that custodial interrogation is inherently coercive and that a defendant must receive detailed warnings that he or she has the rights to remain silent and to receive assistance of counsel before and during questioning. A statement obtained from a defendant during custodial interrogation is admissible only if the State carries its "heavy burden" of establishing that a defendant has executed a valid waiver of the privilege against self-incrimination and the right to counsel. *Id.*, at 475. To do so, the State must demonstrate "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); see *Miranda*, *supra*, at 475–479. In making this determination, courts must examine "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst*, *supra*, at 464.

The language and tenor of the *Miranda* opinion suggested that the Court would require that a waiver of the rights at stake be "specifically made." See 384 U. S., at 470. While the Court retreated from that position in *North Carolina* v. *Butler*, 441 U. S. 369, 373 (1979), I continue to believe that the Court should require the police to obtain an "'affirmative waiver'" of *Miranda* rights before proceeding with interro-

gation. See *id.*, at 377 (quoting *Carnley* v. *Cochran*, 369 U. S. 506, 516 (1962)).

In this case, Barrett affirmatively waived his *Miranda* rights. Unlike the defendant in *Butler*, Barrett orally expressed his willingness to talk with the police *and* willingly signed a form indicating that he understood his rights. The police obtained an explicit oral waiver of the right to silence. Furthermore, the officer who administered the *Miranda* warnings to Barrett testified that the latter understood his rights "[c]ompletely": "I asked [Barrett] several times during my administration of those rights, if, in fact, he understood them; if there were points he wanted me to clarify, and he indicated to me, no, he understood everything fairly well." Tr. 452. At trial, one issue was whether Barrett voluntarily, knowingly, and intelligently waived his *Miranda* rights, and Barrett himself testified that he understood his rights as they were read to him. *Id.*, at 879–880.[1]

Had the State been without Barrett's testimony at trial, where he was represented by counsel, I could not reach this conclusion. Barrett's statement to police—that he would talk to them, but allow nothing in writing without counsel—created doubt about whether he actually understood that anything he *said* could be used against him. In other words, the statement is not, on its face, a knowing and intelligent waiver of the right to silence.[2] As a general matter, I be-

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[1] The trial judge denied Barrett's motion to suppress the statements made following administration of the *Miranda* warnings, holding:

"[T]he Court concludes from the evidence it heard that [Barrett] indicated he understood perfectly what was being read to him. Not only did he indicate that he understood, he offered the statements that he did not need anything explained to him because he understood. So it was not merely a passive acquiescence and his agreement that he understood, he did go on to explain that he did not need anything explained to him because he perfectly understood." App. 70A.

[2] The Court states that "'a defendant's ignorance of the full consequences of his decisions'" would not "'vitiat[e] their voluntariness.'" *Ante*, at 530 (quoting *Oregon* v. *Elstad*, 470 U. S. 298, 316 (1985)). I do not accept that a defendant could voluntarily, knowingly, or intelligently

lieve that this odd juxtaposition (a willingness to talk and an unwillingness to have anything preserved) militates against finding a knowing or intelligent waiver of the right to silence. See *Butler*, *supra*, at 378 ("[T]here is no reason to believe that [the defendant's] oral statements, which followed a refusal to sign a written waiver form, were intended to signify relinquishment of his rights").[3] But Barrett's testimony revealed that he understood that he had rights to remain silent and to have an attorney present, and that anything he said could be used against him; nevertheless he chose to speak.

In sum, the State has carried its "heavy burden" of demonstrating waiver. It has shown that Barrett received the *Miranda* warnings, that he had the capacity to understand them[4] and *in fact* understood them, and that he expressly

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waive a right that he or she does not understand to exist. Cf. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 277 (1973) (BRENNAN, J., dissenting) ("The Court holds today that an individual can effectively waive this right [to be secure against an unreasonable search] even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of privacy would be constitutionally prohibited. It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence"); *ibid.* (MARSHALL, J., dissenting) ("I would have thought that the capacity to choose necessarily depends upon knowledge that there is a choice to be made. But today the Court reaches the curious result that one can choose to relinquish a constitutional right—the right to be free of unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search").

[3] See also 1 W. LaFave & J. Israel, Criminal Procedure § 6.9(f), pp. 534–535 (1984 ed.) ("[T]he *Butler* facts certainly suggest that the defendant misperceived the effect of a waiver which was oral rather than written. Under such circumstances, there is much to be said for the view that the police are under an obligation to clear up misunderstandings of this nature which are apparent to any reasonable observer. Short of this, it certainly makes sense to conclude that the defendant's conduct should significantly increase the prosecution's burden to overcome the presumption against waiver of the *Miranda* rights").

[4] It is undisputed that the defendant here, unlike the defendant in *Butler*, had the capacity to understand his rights: the police ascertained that Barrett had a 12th-grade education, Tr. 458, while in *Butler* there was a

waived his right to silence, saying that he "had no problem in talking about the incident." Tr. 452; see also *id.*, at 461–462, 490–491, 674. In my view, each of these findings was essential to the conclusion that a voluntary, knowing, and intelligent waiver of the *Miranda* rights occurred.

II

Barrett argues that his refusal to make a written statement without an attorney present constituted an invocation of the right to counsel for all purposes and that any further interrogation after this mention of his desire for an attorney was impermissible under *Edwards* v. *Arizona*, 451 U. S. 477 (1981). It is settled that any plain reference, however glancing, to a need or a desire for representation must result in the cessation of questioning. See *Miranda*, 384 U. S., at 444–445 (questioning must cease when the accused "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking"); *Smith* v. *Illinois*, 469 U. S. 91 (1984) *(per curiam)*.

I believe that a partial invocation of the right to counsel, without more, invariably will be ambiguous. It gives rise to doubts about the defendant's precise wishes regarding representation and about his or her understanding of the nature and scope of the right to counsel. Thus, the police may not infer from a partial invocation of the right to counsel *alone* that the defendant has waived any of his or her rights not specifically invoked.

However, circumstances may clarify an otherwise ambiguous situation. If the partial invocation is accompanied by an explicit waiver of the right to silence that is voluntary, knowing, and intelligent, it may lose its ambiguity.[5] It may be-

dispute over whether the defendant could read. *North Carolina* v. *Butler*, 441 U. S. 369, 378 (1979).

[5] In order for a valid waiver and partial invocation of the right to counsel to occur, the accused must effect them contemporaneously. In *Smith* v. *Illinois*, 469 U. S. 91 (1984) *(per curiam)*, the Court considered a defendant's plain request for counsel that had been closely followed by statements

come clear that the portion of the right to counsel that was not invoked was in fact waived, when, for example, a knowing and intelligent waiver of the right to silence necessarily includes a waiver of the right to have counsel present at questioning. This is such a case.[6] Here Barrett's limited invocation was not ambiguous: It was accompanied by an express waiver of his right to silence, the validity of which was plainly established by his subsequent trial testimony. The accompaniment of Barrett's reference to his limited desire for counsel with an explicit waiver of his right to silence rendered permissible the authorities' use of his statements.[7]

For these reasons, I concur in the judgment of the Court.

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rendering equivocal or ambiguous his first request. The State Supreme Court determined that the defendant's statements, considered as a totality, were ambiguous and therefore did not invoke his right to counsel. We held that "an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." *Id.*, at 100. Thus, if the initial request for counsel is clear, as it was here, the police may not create ambiguity in a defendant's desire by continuing to question him or her about it.

[6] See also *United States* v. *Jardina*, 747 F. 2d 945, 949 (CA5 1984) (The defendant stated "without the slightest ambiguity that he would then and there answer some questions but not others" and "clearly indicated that he wished his attorney to work out a cooperative deal with the government in the future." The Court of Appeals found that these combined statements "did not invoke any *present* right to counsel").

[7] It is undisputed that "[h]ad the police obtained [a written] statement without meeting the waiver standards of *Edwards* [v. *Arizona*, 451 U. S. 477 (1981)], it would clearly be inadmissible." *Ante*, at 529. Barrett's invocation of his rights demonstrates that he opposed any immediate preservation of statements made without counsel. If the attempt to tape Barrett's statements had succeeded, the recording would have been inadmissible.

In addition, the police attempted to persuade Barrett to waive the right he had asserted not to make a written statement without the assistance of counsel, not once, but twice, absent any indication from Barrett that he had changed his mind on this point. Tr. 689 ("Sergeant Genovese at the first [questioning] and Lieutenant Howard at the second inquired whether or not he had changed his mind [about reducing his statements to writing]"); see also *id.*, at 521. In *Edwards* v. *Arizona*, 451 U. S., at 484–485,

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

The Court's disposition of this case raises two troublesome questions.

First, why did the Court decide to exercise its discretion to grant review in this case? The facts of the case are surely unique. They do not give rise to any issue of general or recurring significance. There is no conflict among the state or federal courts on how the narrow question presented should be resolved. It is merely a case in which one State Supreme Court arguably granted more protection to a citizen accused of crime than the Federal Constitution requires.[1] The State "asks us to rule that the state court interpreted federal rights too broadly and 'overprotected' the citizen." *Michigan* v. *Long*, 463 U. S. 1032, 1068 (1983) (STEVENS, J., dissenting). If this is a sufficient reason for adding a case to our already overcrowded docket, we will need, not one, but several newly fashioned "intercircuit tribunals" to keep abreast of our work.

Second, why was respondent's request for the assistance of counsel any less ambiguous than the request in *Edwards* v. *Arizona*, 451 U. S. 477 (1981)? In that case, the defendant said that he wanted an attorney "'before making a deal.'"

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we held that once an accused invokes the right to counsel, he or she is not subject to further custodial interrogation "until counsel has been made available to him [or her], unless the accused . . . initiates further communication, exchanges, or conversations with the police." Here the police failed to respect Barrett's limited assertion of his right to counsel. Had a written statement been obtained as a result of these persistent efforts to change Barrett's mind, it would have been inadmissible.

[1] "The central contention of the Petitioner in this action is that the Connecticut Supreme Court unduly expanded the protections accorded criminal defendants under the Fifth Amendment to the United States [C]onstitution when it determined that this defendant involuntarily waived his right to assistance of counsel at his interrogation. This result was possible only through use of a prophylactic rule which ignored the circumstances of this case." Pet. for Cert. 5.

Id., at 479. He also said he would talk to the police "'but I don't want it on tape.'" *Ibid.* The police interrogation complied with the everyday meaning of both of those conditions; it occurred before Edwards made any "deal"—indeed, he never made a deal—and no tape recording of the session was made. The Court nevertheless found the interrogation objectionable. In this case, respondent requested an attorney before signing a written statement. Why the police's compliance with the literal terms of that request makes the request—as opposed to the subsequent waiver[2]—any less of a request for the assistance of counsel than Edwards' is not adequately explained in the Court's opinion. In all events, the Court does not purport to change the governing rule of law that judges must "give a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Michigan* v. *Jackson*, 475 U. S. 625, 633 (1986).

I would dismiss the writ of certiorari as improvidently granted.

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[2] In this case, the Connecticut Supreme Court interpreted the trial court's ruling as embodying a factual finding that respondent had requested the assistance of counsel but *thereafter* waived his right to counsel. It agreed with that factual determination but held that the subsequent waiver was ineffective as a matter of law. 197 Conn. 50, 60, 495 A. 2d 1044, 1050 (1985).

CALIFORNIA *v.* BROWN

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 85–1563. Argued December 2, 1986—Decided January 27, 1987

A jury found respondent guilty of forcible rape and first-degree murder at his California state-court trial. At the penalty phase, the trial court instructed the jury to consider and weigh the aggravating and mitigating circumstances, but cautioned that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." On automatic appeal, the California Supreme Court reversed respondent's death sentence, holding that the quoted instruction violated federal constitutional law by denying respondent the right to have "sympathy factors" raised by the evidence considered by the jury when determining the appropriate penalty.

Held: The instruction in question does not violate the Eighth and Fourteenth Amendments when given during the penalty phase of a capital murder trial. Pp. 541–543.

(a) The instruction does not violate either of the Eighth Amendment's prerequisites to a valid death sentence that sentencers not be given unbridled discretion and that defendants be allowed to introduce any relevant mitigating evidence. P. 541.

(b) The California Supreme Court improperly focused solely on the word "sympathy" in the instruction. A reasonable juror would be unlikely to single out the word "sympathy" from the other nouns accompanying it, and would most likely interpret the admonition to avoid basing a decision on "mere sympathy" as a directive to ignore only the sort of sympathy that was not rooted in the aggravating and mitigating evidence introduced during the penalty phase. Pp. 541–543.

(c) By limiting the jury's sentencing considerations to record evidence, the instruction serves the useful purpose of cautioning the jury against reliance on extraneous emotional factors, and thereby fosters the Eighth Amendment's need for reliability in death sentence determinations and ensures the availability of meaningful judicial review. P. 543.

40 Cal. 3d 512, 709 P. 2d 440, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, POWELL, O'CONNOR, and SCALIA, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 544. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, and in Parts II, III, IV, and V of which STE-

VENS, J., joined, *post*, p. 547. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 561.

Jay M. Bloom, Supervising Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Steve White*, Chief Assistant Attorney General, and *Harley D. Mayfield*, Assistant Attorney General.

Monica Knox argued the cause and filed a brief for respondent.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented for review in this case is whether an instruction informing jurors that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase of a capital murder trial violates the Eighth and Fourteenth Amendments to the United States Constitution. We hold that it does not.

Respondent Albert Brown was found guilty by a jury of forcible rape and first-degree murder in the death of 15-year-old Susan J. At the penalty phase, the State presented evidence that respondent had raped another young girl some years prior to his attack on Susan J. Respondent presented the testimony of several family members, who recounted respondent's peaceful nature and expressed disbelief that respondent was capable of such a brutal crime. Respondent also presented the testimony of a psychiatrist, who stated that Brown killed his victim because of his shame and fear over sexual dysfunction. Brown himself testified, stating that he was ashamed of his prior criminal conduct and asking for mercy from the jury.

**Christopher N. Heard* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Paul W. Cane, Jr., and *Paul Hoffman* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

California Penal Code Ann. § 190.3 (West Supp. 1987) provides that capital defendants may introduce at the penalty phase any evidence "as to any matter relevant to . . . mitigation . . . including, but not limited to, the nature and circumstances of the present offense, . . . and the defendant's character, background, history, mental condition and physical condition."* The trial court instructed the jury to consider the aggravating and mitigating circumstances and to weigh them in determining the appropriate penalty. App. 23–24. But the court cautioned the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id.*, at 20. Respondent was sentenced to death.

On automatic appeal, the Supreme Court of California reversed the sentence of death. 40 Cal. 3d 512, 709 P. 2d 440 (1985). Over two dissents on this point, the majority opinion found that the instruction at issue here violates the Federal Constitution: "'federal constitutional law forbids an instruction which denies a capital defendant the right to have the jury consider any "sympathy factor" raised by the evidence when determining the appropriate penalty . . . .'" *Id.*, at 537, 709 P. 2d, at 453, quoting *People* v. *Lanphear*, 36 Cal. 3d 163, 165, 680 P. 2d 1081, 1082 (1984). Relying on *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), the court ruled that the instruction "is calculated to divert the jury from its constitutional duty to consider 'any [sympathetic] aspect of the defendant's character or record,' whether or not related to the offense for which he is on trial, in deciding the appropriate penalty." 40 Cal. 3d, at 537, 709 P. 2d, at 453. We granted certiorari to resolve whether such an instruction violates the United States Constitution. 476 U. S. 1157 (1986).

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*We have noted our approval of this statutory scheme. *California* v. *Ramos*, 463 U. S. 992, 1005, n. 19 (1983). See also *Pulley* v. *Harris*, 465 U. S. 37, 53 (1984).

The Eighth Amendment jurisprudence of this Court establishes two separate prerequisites to a valid death sentence. First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Furman* v. *Georgia*, 408 U. S. 238 (1972). Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his "'character or record and any of the circumstances of the offense.'" *Eddings*, *supra*, at 110, quoting *Lockett*, *supra*, at 604. Consideration of such evidence is a "constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina*, *supra*, at 304 (opinion of Stewart, POWELL, and STEVENS, JJ.). The instruction given by the trial court in this case violates neither of these constitutional principles.

We think that the California Supreme Court improperly focused solely on the word "sympathy" to determine that the instruction interferes with the jury's consideration of mitigating evidence. "The question, however, is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning." *Francis* v. *Franklin*, 471 U. S. 307, 315–316 (1985); see *Sandstrom* v. *Montana*, 442 U. S. 510, 516–517 (1979). To determine how a reasonable juror could interpret an instruction, we "must focus initially on the specific language challenged." *Francis* v. *Franklin*, 471 U. S., at 315. If the specific instruction fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law. *Ibid.* In this case, we need not reach the second step of analysis because we hold that a reasonable juror would not interpret

the challenged instruction in a manner that would render it unconstitutional.

The jury was told not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." Respondent does not contend, and the Supreme Court of California did not hold, that conjecture, passion, prejudice, public opinion, or public feeling should properly play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor. Rather, respondent reads the instruction as if it solely cautioned the jury not to be swayed by "sympathy." Even if we were to agree that a rational juror could parse the instruction in such a hypertechnical manner, we would disagree with both respondent's interpretation of the instruction and his conclusion that the instruction is unconstitutional.

By concentrating on the noun "sympathy," respondent ignores the crucial fact that the jury was instructed to avoid basing its decision on *mere* sympathy. Even a juror who insisted on focusing on this one phrase in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase. While strained in the abstract, respondent's interpretation is simply untenable when viewed in light of the surrounding circumstances. This instruction was given at the end of the penalty phase, only after respondent had produced 13 witnesses in his favor. Yet respondent's interpretation would have these two words transform three days of favorable testimony into a virtual charade. We think a reasonable juror would reject that interpretation, and instead understand the instruction not to rely on "mere sympathy" as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase.

We also think it highly unlikely that any reasonable juror would almost perversely single out the word "sympathy" from the other nouns which accompany it in the instruction:

conjecture, passion, prejudice, public opinion, and public feeling. Reading the instruction as a whole, as we must, it is no more than a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty. The doctrine of *noscitur a sociis* is based on common sense, and a rational juror could hardly hear this instruction without concluding that it was meant to confine the jury's deliberations to considerations arising from the evidence presented, both aggravating and mitigating.

An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U. S., at 305. Indeed, by limiting the jury's sentencing considerations to record evidence, the State also ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process. See *Roberts* v. *Louisiana*, 428 U. S. 325, 335, and n. 11 (1976) (opinion of Stewart, POWELL and STEVENS, JJ.).

We hold that the instruction challenged in this case does not violate the provisions of the Eighth and Fourteenth Amendments to the United States Constitution. The judgment of the Supreme Court of California is therefore reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

This case squarely presents the tension that has long existed between the two central principles of our Eighth Amendment jurisprudence. In *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976), JUSTICES Stewart, POWELL, and STEVENS concluded that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." In capital sentencing, therefore, discretion must be "'controlled by clear and objective standards so as to produce non-discriminatory application.'" *Id.*, at 198 (quoting *Coley* v. *State*, 231 Ga. 829, 834, 204 S. E. 2d 612, 615 (1974)). See also *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.) (State must provide "specific and detailed guidance" to the sentencing body). On the other hand, this Court has also held that a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense. *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion).

The issue in this case is whether an instruction designed to satisfy the principle that capital sentencing decisions must not be made on mere whim, but instead on clear and objective standards, violates the principle that the sentencing body is to consider any relevant mitigating evidence. JUSTICE BRENNAN in his dissenting opinion contends that the instruction at issue "precludes precisely the response that a defendant's evidence of character and background is designed to elicit." *Post*, at 548. The Court, on the other hand, holds that the instruction merely admonishes the jury "to ignore emotional responses that are not rooted in the aggravating

and mitigating evidence introduced during the penalty phase." *Ante*, at 542.

In my view, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. As this Court observed in *Eddings*, the common law has struggled with the problem of developing a capital punishment system that is "sensible to the uniqueness of the individual." 455 U. S., at 110. *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

Because the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence, I agree with the Court that an instruction informing the jury that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" does not by itself violate the Eighth and Fourteenth Amendments to the United States Constitution. At the same time, the jury instructions—taken as a whole—must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime. As JUSTICE BRENNAN's dissent illustrates, however, one difficulty with attempts to remove emotion from capital sentencing through instructions such as those at issue in this case is that juries may be misled into believing

that mitigating evidence about a defendant's background or character also must be ignored. See *post*, at 555.

On remand, the California Supreme Court should determine whether the jury instructions, taken as a whole, and considered in combination with the prosecutor's closing argument, adequately informed the jury of its responsibility to consider all of the mitigating evidence introduced by the respondent. The jury was given instruction 8.84.1, 1 California Jury Instructions, Criminal (4th ed. 1979) (CALJIC), which lists the specific aggravating and mitigating factors the sentencer is to consider in determining punishment. Only one subsection of that instruction even arguably applies to the nonstatutory mitigating factors:

> "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CALJIC 8.84.1(k).

The respondent contends that the jury might have understood this instruction as mandating consideration only of mitigating evidence about the circumstances of the *crime*, and not evidence about the defendant's background and character. Moreover, in his closing remarks, the prosecutor in this case may have suggested to the jury that it must ignore the mitigating evidence about the respondent's background and character. In combination with the instructions, the comments of the prosecutor may create a "legitimate basis for finding ambiguity concerning the factors actually considered by the" jury. *Eddings* v. *Oklahoma*, *supra*, at 119 (O'CONNOR, J., concurring).

Because it is open to the California Supreme Court to determine on remand whether the jury was adequately informed of its obligation to consider all of the mitigating evidence introduced by the respondent, I concur in the judgment and opinion of the Court.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE STEVENS joins as to Parts II–V, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I dissent from the Court's opinion to the extent that it would result in the imposition of the death penalty upon respondent. *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I would affirm the California Supreme Court, for that court has reasonably interpreted the jury instruction at issue to divert the jury from its constitutional duty to consider all mitigating evidence introduced by a defendant at the sentencing phase of trial.

II

A sentencing instruction is invalid if it precludes the sentencer from "considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion) (emphasis omitted). Furthermore, an instruction cannot stand if it leaves the jury unclear as to whether it may consider such evidence. "[W]e may not speculate as to whether the [sentencer] actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances," since our case law "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered . . . ." *Eddings* v. *Oklahoma*, 455 U. S. 104, 119 (1982) (O'CONNOR, J., concurring).

The issue in this case is whether a jury might reasonably interpret the California jury instruction in either of these two ways. The facial language of the instruction, the manner in which it has been construed in trials in California, and experi-

ence with other provisions of the state sentencing scheme all buttress California's interpretation of its own jury instruction. In light of this evidence, there is simply no warrant for this Court to override the state court's assessment of how a jury in California might reasonably interpret the instruction before us.

III

A

The instruction at issue informed the jury: "You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." App. 20.[1] In forbidding the sentencer to take sympathy into account, this language on its face precludes precisely the response that a defendant's evidence of character and background is designed to elicit, thus effectively negating the intended effect of the Court's requirement that all mitigating evidence be considered. As the plurality said in *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976), such evidence is intended to induce consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." In *Eddings*, *supra*, for example, we struck down petitioner's death sentence because of the failure of the trial judge to consider Eddings' troubled childhood as a mitigating factor. The fact that his parents divorced when he was five, that his mother was an alcoholic and possibly a prostitute, and that his father used excessive physical punishment were all deemed relevant to the sentencing decision, 455 U. S., at 107, because of their potential for evoking sympathy for petitioner.

The State acknowledges that sympathy for the defendant is appropriate, but contends that the antisympathy instruction simply prevents the jury from relying on "untethered sympathy" unrelated to the circumstances of the offense or the defendant. Brief for Petitioner 49, 58. Yet, as the Cali-

[1] The language of this instruction was drawn from the longer instruction 1.00 of 1 California Jury Instructions, Criminal (4th ed. 1979) (CALJIC).

fornia court has noted on other occasions, see *People* v. *Easley*, 34 Cal. 3d. 858, 875–876, 671 P. 2d 813, 824 (1983), the instruction gives no indication whatsoever that the jury is to distinguish between "tethered" and "untethered" sympathy. The Court nonetheless accepts the notion that a jury would interpret the instruction to require such a distinction. None of the reasons it offers for accepting this implausible construction are persuasive.

First, the Court finds it significant that the jury was instructed not simply to avoid sympathy, but to avoid "mere" sympathy. This word, contends the Court, would likely lead a juror to interpret the instruction "as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Ante*, at 542. The instruction, however, counsels the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." A juror could logically conclude that "mere" modified only "sentiment," so it is by no means clear that the instruction would likely be construed to preclude reliance on "mere sympathy." In order for "mere" to be regarded as modifying "sympathy," as the Court contends, "mere" must be read to modify all the other terms in the instruction as well: conjecture, passion, prejudice, public opinion, or public feeling. By the Court's own logic, since "mere" serves to distinguish "tethered" from "untethered" sympathy, it also serves to distinguish "tethered" from "untethered" versions of all the other emotions listed. Yet surely no one could maintain, for instance, that some "tethered" form of prejudice relating to the case at hand could ever be appropriate in capital sentencing deliberations. Indeed, the Court describes the nouns accompanying "sympathy" in the instructions as "no more than a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty." *Ante*, at 543. The single word

"mere" therefore cannot shoulder the burden of validating this antisympathy instruction.

Second, the Court argues that jurors must assume that the defendant would not introduce evidence of character and background if the jury could not consider such information. *Ante*, at 542. It is equally likely, however, that jurors instructed not to rely on sympathy would conclude that the defendant had simply gone too far in his presentation, and that, as in other trial contexts, the jury must look to the judge for guidance as to that portion of the evidence that appropriately could be considered. Instructions are commonly given at the end of trial which clarify the significance of evidence and of events at trial, since the jury is not at liberty to assume that everything that occurs at trial is automatically or equally relevant to its deliberations.

Finally, the Court says that, since "sympathy" is accompanied in the instruction by a list of obviously impermissible factors, a juror would naturally assume that the instruction "was meant to confine the jury's deliberations to considerations arising from the evidence presented, both aggravating and mitigating." *Ante*, at 543. How a juror would be expected to make this leap is unclear. The inclusion of "sympathy" in an expansive list of impermissible emotions would logically lead a juror to conclude that *any* response rooted in emotion was inappropriate. An average juror is likely to possess the common understanding that law and emotion are antithetical, and an instruction that a wide range of emotional factors are irrelevant to his or her deliberation reinforces that notion. It is simply unrealistic to assume that an instruction ruling out several emotions in unqualified language would be construed as a directive that certain forms of emotion are permissible while others are not. While we generally assume that jurors are rational, they are not telepathic.

The vast majority of jurors thus can be expected to interpret "sympathy" to mean "sympathy," not to engage in the tortuous reasoning process necessary to construe it as

"untethered sympathy." We would be far more likely in fact to call into question the fidelity to duty of a juror who did the latter. The assertion that the instruction in question serves the purpose of channeling the jury's sympathy in a legitimate direction is therefore completely unfounded.[2]

Even if the majority's interpretation of the instruction were considered as plausible as that of the state court, this would be insufficient to save the instruction. The very plausibility of the lower court's construction means that there is a significant prospect that a juror would interpret the instruction so as to restrict or obfuscate the duty to consider mitigating evidence. As we held in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), the fact that a reasonable juror could have construed an instruction to make it unconstitutional is adequate to invalidate that instruction. *Id.*, at 526. The fact that jurors *could* have interpreted the instruction so as to make it lawful is irrelevant, for "we cannot be certain that this is what they *did* do." *Ibid.* (emphasis in original). Even if the state court's interpretation is not ineluctable, it is undeniably reasonable—and that is enough to invalidate the instruction.

B

Our assessment of the state court's interpretation of the instruction need not rest simply on what seems in the abstract the most plausible response to the instruction's plain language. That court's construction is bolstered by experience

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[2]The Court also suggests that an antisympathy instruction actually benefits a defendant in that it prevents the sentencer from being influenced by sympathy for the *victim*. *Ante*, at 543. It may be that the instruction produces this result in certain cases. But it also undoubtedly precludes sympathy for the defendant in other instances, since the language of the instruction draws no distinction between these two types of sympathy. The fact that a defendant may on occasion benefit from the provision in question is insufficient to outweigh the fact that the instruction can reasonably be construed to negate the effect of a significant portion of a defendant's mitigating evidence. Whatever speculative benefit the instruction bestows on the defendant cannot be purchased at such a price.

with how the instruction actually has been interpreted in the state trial system. This experience dates back at least to 1970, when the State Supreme Court invalidated an instruction virtually identical to the one at issue in this case. *People* v. *Bandhauer*, 1 Cal. 3d 609, 618, 463 P. 2d 408, 416 (1970). That instruction informed the jury: "The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Ibid.* The court ruled that such guidance was inconsistent with state case law holding that the jury at a penalty trial could not be instructed not to consider sympathy for the defendant, see, *e. g.*, *People* v. *Polk*, 63 Cal. 2d 443, 406 P. 2d 641 (1965).[3] In *Bandhauer*, the court further found that the antisympathy directive was not saved by a companion instruction that told the jury: "[Y]ou are entirely free to act according to your own judgment, conscience and absolute discretion," for that instruction merely created an inconsistency that the jury might well resolve "by concluding that the restriction on sympathy served as an exception to [its] otherwise unlimited discretion." 1 Cal. 3d, at 618–619, 463 P. 2d, at 416.

It was against this backdrop that the state court reviewed the virtually identical instruction in this case. The court had the benefit of experience not only with the earlier instruction invalidated in *Bandhauer*, but with the more recent instruction as well. In its 1983 decision in *Easley*, reviewing the later instruction, the court had noted that the drafters of the antisympathy instruction had cautioned that "'[t]his instruction 1.00 should not be used in the penalty phase of a capital case,'" and that instructions pertaining to the consideration

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[3] This requirement that the jury not be precluded from relying on sympathy was confirmed after *Furman* v. *Georgia*, 408 U. S. 238 (1972), as consistent with this Court's decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). See *People* v. *Robertson*, 33 Cal. 3d. 21, 57, 655 P. 2d 279, 301 (1982).

of aggravating and mitigating factors were more appropriate at that stage of trial. 34 Cal. 3d, at 876, and n. 5, 671 P. 2d, at 824, and n. 5 (emphasis omitted) (quoting use note to CALJIC 1.00).

Furthermore, state trial records indicate the frequency with which the antisympathy instruction has been interpreted to preclude consideration of a defendant's background and character. In this case, for instance, the prosecutor in his closing argument noted that numerous relatives had testified at the penalty phase on behalf of Brown, and that they "told us what a good boy he was at the time in his youth when they knew him. And he brought them gifts and that he cared after his siblings." App. 90. Nonetheless, said the prosecutor:

> "*They did not testify, ladies and gentlemen, regarding any of the factors which relate to your decision in this case.* Their testimony here, ladies and gentlemen, I would suggest, was a blatant attempt by the defense to inject personal feelings in the case, to make the defendant appear human, to make you feel for the defendant, and although that is admirable in the context of an advocate trying to do his job, *you ladies and gentlemen must steel yourselves against those kinds of feelings in reaching a decision in this case.*
>
> "*As the Judge will instruct you, you must not be swayed by sympathy.*" *Id.*, at 90–91 (emphasis added).

The prosecutor in this case thus interpreted the antisympathy instruction to require that the jury ignore the defendant's evidence on the mitigating factors of his character and upbringing. A similar construction has been placed on the instruction in several other cases. In *People* v. *Robertson*, 33 Cal. 3d 21, 655 P. 2d 279 (1982), for instance, the prosecutor informed the jury that the fact that the defendant "didn't get the breaks in life" was irrelevant, because

"[t]hat's a sympathy factor, a sympathy factor that does not focus on the real issue, the crime and person Andrew Robertson was at the time [the crime] was committed." *Id.*, at 56 and 57, n. 22, 655 P. 2d, at 300, and n. 22. He then noted that at the penalty phase defendant had put on evidence that "went to the person of Andrew Robertson, giving Andrew Robertson's history, where he was born, how old he was, what he did as a young man, the fact that he went into the service. That is not a factor. That is irrelevant to your decision in this case." *Id.*, at 57, n. 22, 655 P. 2d, at 300, n. 22. The prosecutor also dismissed the defendant's evidence of his service in Vietnam, declaring: "This is simply a sympathy ploy. It is going outside the evidence and asking you to have sympathy, compassion." *Ibid.*

Still other cases, pending before the State Supreme Court at the time of argument in this Court, illustrate the gloss that consistently has been placed on the antisympathy instruction. In *People* v. *Gates*, Cr. 22263, the prosecutor informed the jury: "'It's not a time to talk for mercy or forgiveness for Oscar Gates. It's too late for that. . . . The evidence that you received in the case, that what you promised the judge you'd base your decision on, because the time now is not for philosophy or religion, mercy, forgiveness, sorry for the family, feelings of guilt on your own part.'" App. to Brief for Respondent 2a (quoting Tr. 1286–1287). In *People* v. *Walker*, Cr. 21707, the prosecutor stated: "'I also mentioned, and I guess I should mention it now—I wasn't going to—the fact that there had been things here which could elicit sympathy. Things which had nothing to do with the case. Mr. Walker belongs to a large family, and those members have been present here for the jury's observations during the case. But again, obviously that has nothing to do with this case.'" App. to Brief for Respondent (quoting Tr. 3298). In *People* v. *Boyde*, Cr. 22584, the jury was informed that its assessment of the aggravating and mitigating factors "'is not a

question, I believe, that should be guided by emotion, sympathy, pity, anger, hate, or anything like that because it is not rational if you make a decision on that kind of basis.'" App. to Brief for Respondent 3a (quoting Tr. 4767). Furthermore, said the prosecutor: "'[S]ympathy is an interesting thing, because even though you try not to consider it, this decision you are going to make has emotional overtones to it. It would be very hard to completely filter out all our emotions, make the decision on a rational basis. Although the instruction says you are to try to do that.'" App. to Brief for Respondent 3a (quoting Tr. 4817).

Experience with the antisympathy instruction therefore reveals that it is often construed as precluding consideration of precisely those factors of character and background this Court has decreed *must* be considered by the sentencer. See *Eddings*, 455 U. S., at 113–114 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider . . . any relevant mitigating evidence"). Even if the interpretation placed upon the instruction by prosecutors is regarded as the product of excessive zeal, rather than dispassionate construction, the state court had ample reason to conclude that an instruction that consistently lends itself to such plausible construction is likely to leave the jury with the impression that they may not consider certain mitigating evidence, or at least with a sense of confusion on this point. Experience with such instructions over the past 17 years thus provides persuasive support for the state court's construction and invalidation of its own jury instruction.

IV

The State argues that whatever defect the antisympathy instruction might possess is cured by CALJIC instruction 8.84.1. That instruction lists the specific aggravating and mitigating factors the sentencer is to consider in determining

punishment.[4] The State urges that subsection (k) of this instruction directs the sentencer to consider all of the defendant's mitigating evidence. That subsection provides that the jury may take into account "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." After defendant's trial in this case, however, the state court in *Easley*, rejected the assertion that the instruction adequately informed the jury as to the scope of mitigating evidence, and directed that, in order to "avoid potential misunderstanding in the future," trial courts should add to the language of subsection (k) the instruction that the jury may consider "any other aspect of [the] defendant's character or record . . . that the defendant

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[4] Instruction 8.84.1 provides that the jury is to consider the following:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects *[sic]* of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CALJIC 8.84.1.

proffers as a basis for a sentence less than death." 34 Cal. 3d, at 878, n. 10, 671 P. 2d, at 826, n. 10. This assessment of subsection (k) as it existed at the time of defendant's trial reflects the fact that the language itself directs attention only to the circumstances of the crime itself, not to broader considerations relating to background or character. This language is consistent with the focus of all other factors described in CALJIC 8.84.1: the nature of the crime or the condition of the defendant at the time it was committed.

Furthermore, experience with the operation of subsection (k) in practice indicates that the instruction was commonly regarded as narrow in scope. In this case, for instance, the prosecutor went down the list of mitigating factors, explicitly mentioning the "other circumstances" of subsection (k), and on each informed the jury that there was no mitigation. App. 94. In *Easley*, "the prosecutor told the jury that sympathy was not one of the mitigating factors which the law authorized it to consider." 34 Cal. 3d, at 879, n. 11, 671 P. 2d, at 826, n. 11. Other cases involving the instruction to consider "any other circumstance which extenuates the gravity of the crime," pending before the State Supreme Court at the time of argument in this Court, also illustrate the fact that the subsection in this form lends itself to such an interpretation. In *People* v. *Payton*, Cr. 22511, the prosecutor told the jury that factor (k) relates to "'some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. It doesn't refer to anything after the fact or later.'" App. to Brief for Respondent 4a (quoting Tr. 2125). Evidence of the defendant's "'new Christianity and that he helped the module deputies in the jail while he was in custody'" was irrelevant, said the prosecutor, since factor (k) referred only to "'a fact in operation at the time of the offense.'" App. to Brief for Respondent 4a (quoting Tr. 2125). Thus, concluded the prosecutor, such evidence was "'just some jailhouse evidence to win your sympathy, and that's all.'" *Ibid.*

Similarly, in *People* v. *Hamilton*, Cr. 22311, the prosecutor alluded to factor (k), and maintained that the defendant had presented no evidence that properly could be considered. The defendant, observed the prosecutor, had introduced evidence "'from people who knew the defendant well twelve years ago. None of these people knew the defendant or were with the defendant at or about the time these crimes were occurring.'" App. to Brief for Respondent 6a (quoting 19B Tr. 13–14). In *People* v. *Bigelow*, Cr. 22018, the following colloquy occurred regarding the defendant's motion to modify the death verdict:

> "'COURT: Now we have a catchall K, which is any other circumstances *[sic]* which extenuates the gravity of the crime, even though it is not a legal excuse for the crime. Do you have anything you want to tell me under that factor, Mr. Bigelow?
>
> "'DEFENDANT: Extenuates the gravity of the crime, well, that's—would my sisters and brothers, would their testimony fall into that, my childhood, and not being raised with proper parents, and—would that fall into extenuation of the gravity?
>
> "'COURT: No, I don't think that would. I don't see how your childhood, because you've evidently had a not too happy childhood, but that doesn't give you the right to come to America and take an innocent man and kill him. Does it?'" App. to Brief for Respondent 6a–7a (quoting May 8, 1981, Tr. 28).

Finally, in *People* v. *Walker*, Cr. 21707, the prosecutor told the jury with regard to subsection (k) that it is intended to address only those factors that make "'this crime less serious than it looks when you look at the other factors in the case,'" such as "'the person who[m] he killed was someone who meant harm to his family, someone who had threatened him, someone who had made life miserable.'" App. to Brief for Respondent 7a (quoting Tr. 3279–3280).

The state court thus had more than adequate justification, based on both the plain language of subsection (k) and practical experience with its interpretation by participants in the criminal justice system, to assume that a jury might reasonably interpret that subsection narrowly, and that it was unrealistic to assume that juries would construe it to permit consideration of all of a defendant's mitigating evidence.

Even if the Court ignores this wealth of support for the State's interpretation of subsection (k), and finds that the instruction as it existed at the time of Brown's trial directed the jury to consider all of Brown's mitigating evidence, that is insufficient to save the antisympathy instruction. Such a reading of subsection (k) would simply mean that the jury was confronted with inconsistent instructions likely to create the type of confusion the state court viewed as probable in *Bandhauer*. As we said in *Francis* v. *Franklin*, 471 U. S. 307, 322 (1985): "Nothing in [the] specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." Cf. *Sandstrom* v. *Montana*, 442 U. S., at 526 (if possibility of misunderstanding exists, "we have no way of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction").

Finally, the State argues that, even if subdivision (k) is construed as excluding mitigating evidence not related to the circumstances of the crime, the jurors nonetheless understood that the enumeration of factors in instruction 8.84.1 was not exhaustive. This contention is belied by the fact that the jury was instructed that it "shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances *upon which you have been instructed.*" App. 23 (emphasis added). The plain language of this instruction thus rebuts the State's contention, since

the factors upon which the jury was instructed described only specific types of mitigating evidence. Furthermore, the State Supreme Court has interpreted the instruction quoted immediately above in light of the other portions of the 1978 state death penalty scheme, and has concluded that that scheme "necessarily implie[s] that matters not within the statutory list are not entitled to any weight in the penalty determination." *People* v. *Boyd*, 38 Cal. 3d 762, 773, 700 P. 2d 782, 790 (1985) (footnote omitted).[5] There is therefore no basis for speculation that the jury felt unconstrained by the factors listed in instruction 8.84.1.

V

The California Supreme Court in this case has provided an eminently reasonable interpretation of the State's antisympathy instruction. The language of the instruction on its face prohibits a jury from relying on sympathy in determining whether to sentence a defendant to death. The defendant literally staked his life in this case on the prospect that a jury confronted with evidence of his psychological problems and harsh family background would react sympathetically, and any instruction that would preclude such a response cannot stand. Furthermore, even acceptance of the State's attenuated interpretation of other instructions does not mean that these provisions cure the problem with the antisympathy instruction, but leads only to the conclusion that the jury was confronted with *contradictory* instructions, a state of affairs that we have declared intolerable.

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[5] As the court in *Boyd* noted, the potential constitutional infirmity resulting from the fact that none of the factors on its face "appeared broad enough to encompass every aspect of the defendant's character and background he might advance for consideration," 38 Cal. 3d, at 775, 700 P. 2d, at 791, was avoided by the 1983 construction of factor (k) as an open-ended provision permitting the jury to consider any mitigating evidence. See *People* v. *Easley*, 34 Cal. 3d 858, 878, and n. 10, 671 P. 2d 813, 826, and n. 10 (1983).

This Court has proclaimed that in capital cases "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death." *Woodson*, 428 U. S., at 304 (plurality opinion) (citation omitted). Because of the qualitatively different nature of the death penalty, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.*, at 305. Even construed in its most favorable light, the jury instruction at issue in this case did not come close to providing the requisite assurance that the jury in this case was fully aware of the scope of its sentencing duties. Since Brown's mitigating evidence was composed totally of information on his character and background intended to elicit sympathy, it is highly likely that the instruction eliminated his only hope of gaining mercy from the sentencer. Given our particular concern for the reliability of the procedures used to impose the death penalty, as well as the considerable support for the California court's interpretation, it is baffling that this Court strains to find a way to override the state court's construction of its own jury instruction. I cannot acquiesce in such a course of action, and therefore dissent.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

I write separately to emphasize a point to which others have alluded, see *ante*, at 545 (O'CONNOR, J., concurring); *ante*, at 548 and this page (BRENNAN, J., dissenting), but which, in my view, has not been brought into full focus.

The defense's goal in the penalty phase of a capital trial is, of course, to receive a life sentence. See Balske, New Strategies for the Defense of Capital Cases, 13 Akron L. Rev. 331, 357 (1979). While the sentencer's decision to accord life to a defendant at times might be a rational or moral one, it also may arise from the defendant's appeal to the sentencer's

sympathy or mercy, human qualities that are undeniably emotional in nature. See Tr. of Oral Arg. 38, 46, 48.

In a capital sentencing proceeding, the sentencer's discretion must be guided to avoid arbitrary or irrational decisions. See *Gregg* v. *Georgia*, 428 U. S. 153, 195 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). When a jury serves as the sentencing authority, such guidance is provided, in part, through jury instructions. This Court, however, has recognized and even safeguarded the sentencer's power to exercise its mercy to spare the defendant's life. See *Caldwell* v. *Mississippi*, 472 U. S. 320, 331 (1985), quoting *Caldwell* v. *State*, 443 So. 2d 806, 817 (Miss. 1983) (dissenting opinion) ("'The [mercy] plea is made directly to the jury as only they may impose the death sentence'"); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) ("[T]he rule in *Lockett* [v. *Ohio*, 438 U. S. 586 (1978)] is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual"); *Gregg* v. *Georgia*, 428 U. S., at 182 (opinion of Stewart, POWELL, and STEVENS, JJ.) ("Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases").

The sentencer's ability to respond with mercy towards a defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure. Long ago, when, in dissent, I expressed my fear of legislation that would make the death penalty mandatory, and thus remove all discretion from the sentencer, I observed that such legislation would be "regressive . . . , for it [would] eliminat[e] the element of mercy in the imposition of punishment." *Furman* v. *Georgia*, 408 U. S. 238, 413 (1972). In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because, recognizing that the

capital sentencing decision must be made in the context of "contemporary values," *Gregg* v. *Georgia*, 428 U. S., at 181 (opinion of Stewart, POWELL, and STEVENS, JJ.), we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value.

In the real world, as in this case, it perhaps is unlikely that one word in an instruction would cause a jury totally to disregard mitigating factors that the defendant has presented through specific testimony. When, however, a jury member is moved to be merciful to the defendant, an instruction telling the juror that he or she cannot be "swayed" by sympathy well may arrest or restrain this humane response, with truly fatal consequences for the defendant. This possibility I cannot accept, in light of the special role of mercy in capital sentencing and the stark finality of the death sentence. See *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion).

I respectfully dissent.

COLORADO *v.* SPRING

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 85–1517. Argued December 9, 1986—Decided January 27, 1987

In February 1979, respondent and a companion shot and killed one Walker during a hunting trip in Colorado. Thereafter, based on information received from an informant as to respondent's involvement in the interstate transportation of stolen firearms, agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) set up an undercover purchase of firearms from respondent, and on March 30, 1979, arrested him. After being advised of his *Miranda* rights, respondent signed a statement that he understood and waived his rights and was willing to answer questions. The agents then questioned him about the firearms transactions that led to his arrest and also asked him whether he had ever shot anyone, to which he answered that he had "shot another guy once." But when asked whether he had shot a man named Walker, he said "no." On May 26, 1979, Colorado law enforcement officers gave respondent *Miranda* warnings, and he again signed a statement that he understood his rights and was willing to waive them. He then confessed to the Colorado murder and signed a statement to that effect. Upon being charged in a Colorado state court with first-degree murder, respondent moved to suppress both the March 30 and May 26 statements on the ground that his waiver of *Miranda* rights was invalid. The trial court held that the ATF agents' failure to inform respondent before the March 30 interview that they would question him about the Colorado murder did not affect the waiver and that therefore the March 30 statement should not be suppressed. But, while ruling that the March 30 statement was inadmissible on other grounds, the court held that the May 26 statement was made freely, voluntarily, and intelligently and should not be suppressed, and hence admitted it in evidence, and respondent was convicted. The Colorado Court of Appeals reversed, holding that respondent's waiver of his *Miranda* rights before the March 30 statement was invalid because he was not informed that he would be questioned about the Colorado murder, and that the State had failed to prove the May 26 statement was not the product of the prior illegal statement. The Colorado Supreme Court affirmed, holding that respondent's confession to the murder should have been suppressed because it was the illegal "fruit" of the March 30 statement.

Held: A suspect's awareness of all the crimes about which he may be questioned is not relevant to determining the validity of his decision to waive the Fifth Amendment privilege; accordingly, the ATF agents' failure to inform respondent of the subject matter of the interrogation could not affect his decision to waive that privilege in a constitutionally significant manner. Pp. 571–577.

(a) A confession cannot be "fruit of the poisonous tree" if the tree itself is not poisonous. Pp. 571–572.

(b) Respondent's March 30 decision to waive his Fifth Amendment privilege was voluntary absent evidence that his will was overborne and his capacity for self-determination critically impaired because of coercive police conduct. His waiver was also knowingly and intelligently made, that is, he understood that he had the right to remain silent and that anything he said could be used as evidence against him. The Constitution does not require that a suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. Here, there was no allegation that respondent failed to understand that privilege or that he misunderstood the consequences of speaking freely. Pp. 573–575.

(c) Mere silence by law enforcement officials as to the subject matter of an interrogation is not "trickery" sufficient to invalidate a suspect's waiver of *Miranda* rights. Once *Miranda* warnings are given, it is difficult to see how official silence could cause a suspect to misunderstand the nature of his constitutional privilege to refuse to answer any questions that might incriminate him. The additional information in question in this case could affect only the wisdom of a *Miranda* waiver, not its voluntary and knowing nature. Pp. 575–577.

713 P. 2d 865, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 577.

Maureen Phelan, Assistant Attorney General of Colorado, argued the cause for petitioner. With her on the briefs were *Duane Woodard*, Attorney General, *Charles B. Howe*, Deputy Attorney General, and *Richard H. Forman*, Solicitor General.

Lawrence S. Robbins argued the cause for the United States as *amicus curiae* urging reversal. On the brief were

Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Bryson, and *Andrew J. Pincus.*

Seth J. Benezra argued the cause for respondent. With him on the brief were *Margaret L. O'Leary, Thomas M. Van Cleave III,* and *David F. Vela.**

JUSTICE POWELL delivered the opinion of the Court.

In *Miranda* v. *Arizona,* 384 U. S. 436 (1966), the Court held that a suspect's waiver of the Fifth Amendment privilege against self-incrimination is valid only if it is made voluntarily, knowingly, and intelligently. *Id.,* at 444. This case presents the question whether the suspect's awareness of all the crimes about which he may be questioned is relevant to determining the validity of his decision to waive the Fifth Amendment privilege.

I

In February 1979, respondent John Leroy Spring and a companion shot and killed Donald Walker during a hunting trip in Colorado. Shortly thereafter, an informant told agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) that Spring was engaged in the interstate transportation of stolen firearms. The informant also told the agents that Spring had discussed his participation in the Colorado killing. At the time the ATF agents received this information, Walker's body had not been found and the police had received no report of his disappearance. Based on the information received from the informant relating to the firearms violations, the ATF agents set up an undercover operation to purchase firearms from Spring. On March 30, 1979, ATF agents arrested Spring in Kansas City, Missouri, during the undercover purchase.

**Saskia A. Jordan* filed a brief for the Colorado Criminal Defense Bar, Inc., as *amicus curiae* urging affirmance.

Fred E. Inbau, Wayne W. Schmidt, James P. Manak, John K. Van de Kamp, Attorney General of California, *David Crump, Daniel B. Hales, William C. Summers,* and *Jack E. Yelverton* filed a brief for the State of California et al. as *amici curiae.*

An ATF agent on the scene of the arrest advised Spring of his *Miranda* rights.[1] Spring was advised of his *Miranda* rights a second time after he was transported to the ATF office in Kansas City. At the ATF office, the agents also advised Spring that he had the right to stop the questioning at any time or to stop the questioning until the presence of an attorney could be secured. Spring then signed a written form stating that he understood and waived his rights, and that he was willing to make a statement and answer questions.

ATF agents first questioned Spring about the firearms transactions that led to his arrest. They then asked Spring if he had a criminal record. He admitted that he had a juvenile record for shooting his aunt when he was 10 years old. The agents asked if Spring had ever shot anyone else. Spring ducked his head and mumbled, "I shot another guy once." The agents asked Spring if he had ever been to Colorado. Spring said no. The agents asked Spring whether he had shot a man named Walker in Colorado and thrown his body into a snowbank. Spring paused and then ducked his head again and said no. The interview ended at this point.

On May 26, 1979, Colorado law enforcement officials visited Spring while he was in jail in Kansas City pursuant to his arrest on the firearms offenses. The officers gave Spring the *Miranda* warnings, and Spring again signed a written form indicating that he understood his rights and was willing to waive them. The officers informed Spring that they wanted to question him about the Colorado homicide. Spring indicated that he "wanted to get it off his chest." In an interview that lasted approximately 1½ hours, Spring confessed to the Colorado murder. During that time, Spring

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[1] Under this Court's decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), prior to a custodial interrogation a criminal suspect must "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*, at 444.

talked freely to the officers, did not indicate a desire to terminate the questioning, and never requested counsel. The officers prepared a written statement summarizing the interview. Spring read, edited, and signed the statement.

Spring was charged in Colorado state court with first-degree murder. Spring moved to suppress both statements on the ground that his waiver of *Miranda* rights was invalid. The trial court found that the ATF agents' failure to inform Spring before the March 30 interview that they would question him about the Colorado murder did not affect his waiver of his *Miranda* rights:

> "[T]he questions themselves suggested the topic of inquiry. The questions dealt with 'shooting anyone' and specifically killing a man named Walker and throwing his body in a snowbank in Colorado. The questions were not designed to gather information relating to a subject that was not readily evident or apparent to Spring. Spring had been advised of his right to remain silent, his right to stop answering questions, and to have an Attorney present during interrogation. He did not elect to exercise his right to remain silent or to refuse to answer questions relating to the homicide, nor did he request Counsel during interrogation." App. to Pet. for Cert. 4–A.

Accordingly, the trial court concluded that the March 30 statement should not be suppressed on Fifth Amendment grounds. The trial court, however, subsequently ruled that Spring's statement that he "shot another guy once" was irrelevant, and that the context of the discussion did not support the inference that the statement related to the Walker homicide. For that reason, the March 30 statement was not admitted at Spring's trial. The court concluded that the May 26 statement "was made freely, voluntarily, and intelligently, after [Spring's] being properly and fully advised of his rights, and that the statement should not be suppressed, but should

be admitted in evidence." *Id.*, at 5–A. The May 26 statement was admitted into evidence at trial, and Spring was convicted of first-degree murder.[2]

Spring argued on appeal that his waiver of *Miranda* rights before the March 30 statement was invalid because he was not informed that he would be questioned about the Colorado murder. Although this statement was not introduced at trial, he claimed that its validity was relevant because the May 26 statement that was admitted against him was the illegal "fruit" of the March 30 statement, see *Wong Sun* v. *United States*, 371 U. S. 471 (1963), and therefore should have been suppressed. The Colorado Court of Appeals agreed with Spring, holding that the ATF agents "had a duty to inform Spring that he was a suspect, or to readvise him of his *Miranda* rights, before questioning him about the murder." 671 P. 2d 965, 966 (1983). Because they failed to do so before the March 30 interview, "any waiver of rights in regard to questions designed to elicit information about Walker's death was not given knowingly or intelligently." *Id.*, at 967. The court held that the March 30 statement was inadmissible and that the State had failed to meet its burden of proving that the May 26 statement was not the product of the prior illegal statement. The court reversed Spring's conviction and remanded the case for a new trial, directing that if the State sought to introduce the May 26 statement into evidence, the trial court should determine whether the "taint" of

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[2] Spring also moved to suppress a third statement made on July 13, 1979, after he had pleaded guilty to the federal firearms offenses and after an information charging him with murder had been issued in Colorado. The Colorado Supreme Court unanimously concluded that the statement should be suppressed because the questioning officials made no effort "to reaffirm Spring's decision to waive his constitutional rights after he declined to answer particular questions." 713 P. 2d 865, 878 (1985). We granted certiorari only on the question whether the second statement should have been admitted into evidence. 476 U. S. 1104 (1986). Accordingly, the admissibility of the third statement is not before us.

the March 30 statement was sufficiently attenuated to allow introduction of the May 26 statement.

The Colorado Supreme Court affirmed the judgment of the Court of Appeals, although its reasoning differed in some respects. 713 P. 2d 865 (1985). The court found:

> "[T]he validity of Spring's waiver of constitutional rights must be determined upon an examination of the totality of the circumstances surrounding the making of the statement to determine if the waiver was voluntary, knowing and intelligent. No one factor is always determinative in that analysis. Whether, and to what extent, a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement is simply one factor in the court's evaluation of the total circumstances, although it may be a major or even a determinative factor in some situations." *Id.*, at 872–873 (citations omitted).

The court concluded:

> "Here, the absence of an advisement to Spring that he would be questioned about the Colorado homicide, and the lack of any basis to conclude that at the time of the execution of the waiver, he reasonably could have expected that the interrogation would extend to that subject, *are* determinative factors in undermining the validity of the waiver." *Id.*, at 874 (emphasis in original).

Justice Erickson, joined by Justice Rovira, dissented as to the resolution of this issue, stating:

> "Law enforcement officers have no duty under *Miranda* to inform a person in custody of all charges being investigated prior to questioning him. All that *Miranda* requires is that the suspect be advised that he has the right to remain silent, that anything he says can and will be used against him in court, that he has the right to consult with a lawyer and to have the lawyer present during interrogation, and that if he cannot afford a law-

yer one will be appointed to represent him." *Id.*, at 880 (citations omitted).

The dissenting justices found "ample evidence to support the trial court's conclusion that Spring waived his *Miranda* rights" and rejected "the majority's conclusion that Spring's waiver of his *Miranda* rights on March 30, 1979 was invalid simply because he was not informed of all matters that would be reviewed when he was questioned by the police." *Id.*, at 881. The court remanded the case for further proceedings consistent with its opinion.

We granted certiorari, 476 U. S. 1104 (1986), to resolve an arguable Circuit conflict[3] and to review the Colorado Supreme Court's determination that a suspect's awareness of the possible subjects of questioning is a relevant and sometimes determinative consideration in assessing whether a waiver of the Fifth Amendment privilege is valid. We now reverse.

II

There is no dispute that the police obtained the May 26 confession after complete *Miranda* warnings and after informing Spring that he would be questioned about the Colorado homicide. The Colorado Supreme Court nevertheless held that the confession should have been suppressed because it was the illegal "fruit" of the March 30 statement. A confession cannot be "fruit of the poisonous tree" if the tree itself is not

[3]The Colorado Supreme Court followed the lead of several Federal Courts of Appeals in holding that a suspect's awareness of the subject matter of the interrogation is one factor to be considered in determining whether a waiver of the Fifth Amendment privilege is valid. *United States* v. *Burger*, 728 F. 2d 140, 141 (CA2 1984); *Carter* v. *Garrison*, 656 F. 2d 68, 70 (CA4 1981) *(per curiam)*, cert. denied, 455 U. S. 952 (1982); *United States* v. *McCrary*, 643 F. 2d 323, 328 (CA5 1981). Other Courts of Appeals have found that a suspect's awareness of the subject matter of interrogation is not a relevant factor in determining the validity of a *Miranda* waiver. *United States* v. *Anderson*, 175 U. S. App. D. C. 75, 77, n. 3, 533 F. 2d 1210, 1212, n. 3 (1976); *United States* v. *Campbell*, 431 F. 2d 97, 99, n. 1 (CA9 1970).

poisonous. Our inquiry, therefore, centers on the validity of the March 30 statement.[4]

A

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."[5] This privilege "is fully applicable during a period of custodial interrogation." *Miranda* v. *Arizona*, 384 U. S., at 460–461.[6] In *Miranda*, the Court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*, at 467. Accordingly, the Court formulated the now-familiar "procedural safeguards effective to secure the privilege against self-incrimination." *Id.*, at 444. The Court's fundamental aim in designing the *Miranda* warnings was "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.*, at 469.

Consistent with this purpose, a suspect may waive his Fifth Amendment privilege, "provided the waiver is made voluntarily, knowingly and intelligently." *Id.*, at 444. In this case, the law enforcement officials twice informed Spring

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[4] The State argued for the first time in its petition for rehearing to the Colorado Supreme Court that this Court's decision in *Oregon* v. *Elstad*, 470 U. S. 298 (1985), renders the May 26 statement admissible without regard to the validity of the March 30 waiver. The Colorado Supreme Court noted that the State would be free to make this argument to the trial court on remand. 713 P. 2d, at 876. The question whether our decision in *Oregon* v. *Elstad* provides an independent basis for admitting the May 26 statement therefore is not before us in this case.

[5] This privilege is applicable to the States through the Due Process Clause of the Fourteenth Amendment of the Constitution. *Malloy* v. *Hogan*, 378 U. S. 1 (1964).

[6] The State does not dispute that the statement at issue was obtained during a "custodial interrogation" within the meaning of *Miranda*.

of his Fifth Amendment privilege in precisely the manner specified by *Miranda*. As we have noted, Spring indicated that he understood the enumerated rights and signed a written form expressing his intention to waive his Fifth Amendment privilege. The trial court specifically found that "there was no element of duress or coercion used to induce Spring's statements [on March 30, 1978]." App. to Pet. for Cert. 3–A. Despite the explicit warnings and the finding by the trial court, Spring argues that his March 30 statement was in effect compelled in violation of his Fifth Amendment privilege because he signed the waiver form without being aware that he would be questioned about the Colorado homicide. Spring's argument strains the meaning of compulsion past the breaking point.

B

A statement is not "compelled" within the meaning of the Fifth Amendment if an individual "voluntarily, knowingly and intelligently" waives his constitutional privilege. *Miranda* v. *Arizona*, *supra*, at 444. The inquiry whether a waiver is coerced "has two distinct dimensions." *Moran* v. *Burbine*, 475 U. S. 412, 421 (1986):

> "First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Ibid.* (quoting *Fare* v. *Michael C.*, 442 U. S. 707, 725 (1979)).

There is no doubt that Spring's decision to waive his Fifth Amendment privilege was voluntary. He alleges no "coer-

cion of a confession by physical violence or other deliberate means calculated to break [his] will," *Oregon* v. *Elstad*, 470 U. S. 298, 312 (1985), and the trial court found none. His allegation that the police failed to supply him with certain information does not relate to any of the traditional indicia of coercion: "the duration and conditions of detention . . . , the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control." *Culombe* v. *Connecticut*, 367 U. S. 568, 602 (1961) (opinion of Frankfurter, J.). Absent evidence that Spring's "will [was] overborne and his capacity for self-determination critically impaired" because of coercive police conduct, *ibid.*; see *Colorado* v. *Connelly*, 479 U. S. 157, 163–164 (1986), his waiver of his Fifth Amendment privilege was voluntary under this Court's decision in *Miranda*.

There also is no doubt that Spring's waiver of his Fifth Amendment privilege was knowingly and intelligently made: that is, that Spring understood that he had the right to remain silent and that anything he said could be used as evidence against him. The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. *Moran* v. *Burbine*, *supra*, at 422; *Oregon* v. *Elstad*, *supra*, at 316–317. The Fifth Amendment's guarantee is both simpler and more fundamental: A defendant may not be compelled to be a witness against himself in any respect. The *Miranda* warnings protect this privilege by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him.

In this case there is no allegation that Spring failed to understand the basic privilege guaranteed by the Fifth Amendment. Nor is there any allegation that he misunderstood the consequences of speaking freely to the law enforcement officials. In sum, we think that the trial court was indisputably correct in finding that Spring's waiver was made knowingly and intelligently within the meaning of *Miranda*.

III

A

Spring relies on this Court's statement in *Miranda* that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will . . . show that the defendant did not voluntarily waive his privilege." 384 U. S., at 476. He contends that the failure to inform him of the potential subjects of interrogation constitutes the police trickery and deception condemned in *Miranda*, thus rendering his waiver of *Miranda* rights invalid. Spring, however, reads this statement in *Miranda* out of context and without due regard to the constitutional privilege the *Miranda* warnings were designed to protect.

We note first that the Colorado courts made no finding of official trickery.[7] In fact, as noted above, the trial court expressly found that "there was no element of duress or coercion used to induce Spring's statements." *Supra*, at 573.

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[7] The trial court found: "Though it is true that [the ATF agents] did not specifically advise Spring that a part of their interrogation would include questions about the Colorado homicide, the questions themselves suggested the topic of inquiry." App. to Pet. for Cert. 4–A. According to the Colorado Supreme Court, "It is unclear whether Spring was told by the agents that they wanted to question him specifically about the firearms violations for which he was arrested or whether the agents simply began questioning Spring without making any statement concerning the subject matter of the interrogation. What is clear is that the agents did not tell Spring that they were going to ask him questions about the killing of Walker before Spring made his original decision to waive his *Miranda* rights." 713 P. 2d, at 871.

Spring nevertheless insists that the failure of the ATF agents to inform him that he would be questioned about the murder constituted official "trickery" sufficient to invalidate his waiver of his Fifth Amendment privilege, even if the official conduct did not amount to "coercion." Even assuming that Spring's proposed distinction has merit, we reject his conclusion. This Court has never held that mere silence by law enforcement officials as to the subject matter of an interrogation is "trickery" sufficient to invalidate a suspect's waiver of *Miranda* rights, and we expressly decline so to hold today.[8]

Once *Miranda* warnings are given, it is difficult to see how official silence could cause a suspect to misunderstand the nature of his constitutional right—"his right to refuse to answer any question which might incriminate him." *United States* v. *Washington*, 431 U. S. 181, 188 (1977). "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." *Ibid.* We have held that a valid waiver does not require that an individual be informed of all information "useful" in making his decision or all information that "might . . . affec[t] his decision to confess." *Moran* v. *Burbine*, 475 U. S., at 422. "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in

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[8] In certain circumstances, the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege. See, *e. g.*, *Lynumn* v. *Illinois*, 372 U. S. 528 (1963) (misrepresentation by police officers that a suspect would be deprived of state financial aid for her dependent child if she failed to cooperate with authorities rendered the subsequent confession involuntary); *Spano* v. *New York*, 360 U. S. 315 (1959) (misrepresentation by the suspect's friend that the friend would lose his job as a police officer if the suspect failed to cooperate rendered his statement involuntary). In this case, we are not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation and do not reach the question whether a waiver of *Miranda* rights would be valid in such a circumstance.

deciding whether to speak or stand by his rights." *Ibid.*[9] Here, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature. Accordingly, the failure of the law enforcement officials to inform Spring of the subject matter of the interrogation could not affect Spring's decision to waive his Fifth Amendment privilege in a constitutionally significant manner.

B

This Court's holding in *Miranda* specifically required that the police inform a criminal suspect that he has the right to remain silent and that *anything* he says may be used against him. There is no qualification of this broad and explicit warning. The warning, as formulated in *Miranda*, conveys to a suspect the nature of his constitutional privilege and the consequences of abandoning it. Accordingly, we hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege.

IV

The judgment of the Colorado Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The Court asserts there is "no doubt" that respondent Spring's decision to waive his Fifth Amendment privilege

[9] Such an extension of *Miranda* would spawn numerous problems of interpretation because any number of factors could affect a suspect's decision to waive his *Miranda* rights. The requirement would also vitiate to a great extent the *Miranda* rule's important "virtue of informing police and prosecutors with specificity" as to how a pretrial questioning of a suspect must be conducted. *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979).

was voluntarily, knowingly, and intelligently made. *Ante*, at 573 and 574. I agree, however, with the Colorado Supreme Court that a significant doubt exists in the circumstances of this case and thus the State has failed to carry the "heavy burden" recognized in *Miranda* v. *Arizona*, 384 U. S. 436, 475 (1966), for establishing the constitutional validity of Spring's alleged waiver.

Consistent with our prior decisions, the Court acknowledges that a suspect's waiver of fundamental constitutional rights, such as *Miranda*'s protections against self-incrimination during a custodial interrogation, must be examined in light of the "'"totality of the circumstances."'" *Ante*, at 573, quoting *Moran* v. *Burbine*, 475 U. S. 412, 421 (1986), in turn quoting *Fare* v. *Michael C.*, 442 U. S. 707, 725 (1979); see also *id.*, at 724–725; *North Carolina* v. *Butler*, 441 U. S. 369, 374–375 (1979); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Nonetheless, the Court proceeds to hold that the specific crimes and topics of investigation known to the interrogating officers before questioning begins are "not relevant" to, and in this case "could not affect," the validity of the suspect's decision to waive his Fifth Amendment privilege. *Ante*, at 577. It seems to me self-evident that a suspect's decision to waive this privilege will necessarily be influenced by his awareness of the scope and seriousness of the matters under investigation.

To attempt to minimize the relevance of such information by saying that it "could affect only the wisdom of" the suspect's waiver, as opposed to the validity of that waiver, ventures an inapposite distinction. *Ibid.* Wisdom and validity in this context are overlapping concepts, as circumstances relevant to assessing the validity of a waiver may also be highly relevant to its wisdom in any given context. Indeed, the admittedly "critical" piece of advice the Court recognizes today—that the suspect be informed that whatever he says may be used as evidence against him—is certainly relevant to the wisdom of any suspect's decision to submit to custodial interrogation without first consulting his lawyer. *Ante*, at

574. The Court offers no principled basis for concluding that this is a relevant factor for determining the validity of a waiver but that, under what it calls a *totality* of the circumstances analysis, a suspect's knowledge of the specific crimes and other topics previously identified for questioning can never be.

The Court quotes *Moran* v. *Burbine*, *supra*, at 422, as holding that "a valid waiver does not require that an individual be informed of *all* information 'useful' in making his decision or *all* information that 'might . . . affec[t] his decision to confess.'" *Ante*, at 576 (emphasis added). Noticeably similar is the Court's holding today: "[A] suspect's awareness of *all* the possible subjects of questioning in advance of interrogation is not relevant to determining" the validity of his waiver. *Ante*, at 577 (emphasis added). This careful phraseology avoids the important question whether the lack of *any* indication of the identified subjects for questioning *is* relevant to determining the validity of the suspect's waiver.

I would include among the relevant factors for consideration whether before waiving his Fifth Amendment rights the suspect was aware, either through the circumstances surrounding his arrest or through a specific advisement from the arresting or interrogating officers, of the crime or crimes he was suspected of committing and about which they intended to ask questions. To hold that such knowledge is relevant would not undermine the "'virtue of informing police and prosecutors with specificity' as to how a pretrial questioning of a suspect must be conducted," *ante*, at 577, n. 9 (quoting *Fare* v. *Michael C.*, *supra*, at 718), nor would it interfere with the use of legitimate interrogation techniques. Indeed, requiring the officers to articulate at a minimum the crime or crimes for which the suspect has been arrested could contribute significantly toward ensuring that the arrest was in fact lawful and the suspect's statement not compelled because of an error at this stage alone, a problem we addressed in *Brown* v. *Illinois*, 422 U. S. 590, 601 (1975), under the

Fourth Amendment on the assumption that the defendant's waiver of his Fifth Amendment rights in that case had been voluntary. See also *Dunaway* v. *New York*, 442 U. S. 200, 217 (1979) (voluntary waiver of *Miranda* warnings is a threshold requirement for Fourth Amendment analysis).

The interrogation tactics utilized in this case demonstrate the relevance of the information Spring did not receive. The agents evidently hoped to obtain from Spring a valid confession to the federal firearms charge for which he was arrested and then parlay this admission into an additional confession of first-degree murder. Spring could not have expected questions about the latter, separate offense when he agreed to waive his rights, as it occurred in a different State and was a violation of state law outside the normal investigative focus of federal Alcohol, Tobacco, and Firearms agents.

"Interrogators describe the point of the first admission as the 'breakthrough' and the 'beachhead,' R. Royal & S. Schutt, The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide 143 (1976), which once obtained will give them enormous 'tactical advantages,' F. Inbau & J. Reid, Criminal Interrogation and Confessions 82 (2d ed. 1967)." *Oregon* v. *Elstad*, 470 U. S. 298, 328 (1985) (BRENNAN, J., dissenting). The coercive aspects of the psychological ploy intended in this case, when combined with an element of surprise which may far too easily rise to a level of deception,[1] cannot be justified in light of *Miranda*'s strict

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[1] The Court rejects, for now, the notion that "mere silence" by law enforcement officials may deprive the suspect of information so relevant to his decision to waive his *Miranda* rights as to constitute deception, though it does acknowledge that circumstances can arise in which an affirmative misrepresentation by the officers will invalidate the suspect's waiver. *Ante*, at 576, and n. 8. In *Moran* v. *Burbine*, 475 U. S. 412, 453 (1986), I joined JUSTICE STEVENS' dissenting opinion, which stated that "there can be no constitutional distinction . . . between a deceptive misstatement and the concealment by the police of the critical fact that an attorney retained by the accused or his family has offered assistance . . . ." I would hold the officers' failure in the present case to inform Spring of their intent to ques-

requirements that the suspect's waiver and confession be voluntary, knowing, and intelligent. 384 U. S., at 445–458, 475–476. If a suspect has signed a waiver form with the intention of making a statement regarding a specifically alleged crime, the Court today would hold this waiver valid with respect to questioning about any other crime, regardless of its relation to the charges the suspect believes he will be asked to address. Yet once this waiver is given and the intended statement made, the protections afforded by *Miranda* against the "inherently compelling pressures" of the custodial interrogation, *id.*, at 467, have effectively dissipated. Additional questioning about entirely separate and more serious suspicions of criminal activity can take unfair advantage of the suspect's psychological state, as the unexpected questions cause the compulsive pressures suddenly to reappear. Given this technique of interrogation, a suspect's understanding of the topics planned for questioning is, therefore, at the very least "relevant" to assessing whether his decision to talk to the officers was voluntarily, knowingly, and intelligently made.

Not only is the suspect's awareness of the suspected criminal conduct relevant, its absence may be determinative in a given case. The State's burden of proving that a suspect's waiver was voluntary, knowing, and intelligent is a "heavy" one. *Miranda*, 384 U. S., at 475. We are to "'indulge every reasonable presumption against waiver' of fundamental constitutional rights" and we shall "'not presume acquiescence in the loss of fundamental rights.'" *Johnson*,

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tion him about the Colorado murder equally critical. *Miranda* v. *Arizona*, 384 U. S. 436 (1966), places an especially heavy burden on the State to show that a suspect waived his privilege against self-incrimination: "*[A]ny* evidence that the accused was threatened, *tricked*, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.*, at 476 (emphasis added). I would hold that the interrogating officers' preconceived plan in this case to obtain a waiver from Spring with reference to a particular federal offense and then ask about a separate, unrelated state offense precludes the State from carrying that heavy burden.

304 U. S., at 464 (citations omitted); see *Brewer* v. *Williams*, 430 U. S. 387, 404 (1977). It is reasonable to conclude that, had Spring known of the federal agents' intent to ask questions about a murder unrelated to the offense for which he was arrested, he would not have consented to interrogation without first consulting his attorney. In this case, I would therefore accept the determination of the Colorado Supreme Court that Spring did not voluntarily, knowingly, and intelligently waive his Fifth Amendment rights. 713 P. 2d 865, 873–874 (1985).[2]

I dissent.

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[2] Nothing in the Court's decision today precludes the courts of Colorado from interpreting that State's Constitution as independently recognizing a suspect's knowledge of the intended scope of interrogation as a relevant factor for determining whether he validly waived his right against self-incrimination under state law. See Colo. Const., Art. II, § 18.

REPORTER'S NOTE

The next page is purposely numbered 801. The numbers between 582 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM OCTOBER 6, 1986, THROUGH FEBRUARY 23, 1987

OCTOBER 6, 1986*

Affirmed on Appeal

No. 85–1890. GARLAND INDEPENDENT SCHOOL DISTRICT ET AL. *v.* TEXAS STATE TEACHERS ASSN. ET AL. Affirmed on appeal from C. A. 5th Cir. THE CHIEF JUSTICE and JUSTICE WHITE would note probable jurisdiction and set case for argument. Reported below: 777 F. 2d 1046.

No. 85–1979. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. *v.* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO, ET AL. Affirmed on appeal from D. C. D. C. Reported below: 634 F. Supp. 336.

Appeals Dismissed

No. 85–1953. KANSAS CITY POWER & LIGHT CO. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. Reported below: 238 Kan. 842, 715 P. 2d 19.

No. 85–2033. NINTH STREET COMMUNITY PAVING PROJECT COMMITTEE ET AL. *v.* CITY OF IRONTON, OHIO, ET AL. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 22 Ohio St. 3d 25, 488 N. E. 2d 204.

No. 85–2057. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. *v.* STATE BOARD OF EQUALIZATION AND ASSESSMENT ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 67 N. Y. 2d 783, 492 N. E. 2d 130.

No. 85–2112. LODI TRUCK SERVICE, INC. *v.* DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA. Appeal from App. Dept.,

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*JUSTICE SCALIA took no part in the consideration or decision of the orders announced on this date except for the order making allotment of Justices among the Circuits, see *ante*, p. v.

Super. Ct. Cal., County of San Joaquin, dismissed for want of substantial federal question.

No. 85–2161. PETROWSKI *v.* NORWICH FREE ACADEMY ET AL. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question.

No. 85–2170. DROCIAK *v.* SUPREME COURT OF NEW HAMPSHIRE. Appeal from Sup. Ct. N. H. dismissed for want of substantial federal question.

No. 85–6767. CHICCO *v.* STARECHESKI ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: 396 Mass. 1105, 488 N. E. 2d 1179.

No. 86–14. BUCKLEY *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 510 Pa. 326, 508 A. 2d 281.

No. 86–122. THOMPSON *v.* THOMPSON. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

No. 86–168. D. R. MERTENS, INC. *v.* FLORIDA DEPARTMENT OF INSURANCE. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of substantial federal question. Reported below: 478 So. 2d 1132.

No. 86–201. ZUCKERMAN PROPERTY ENTERPRISES, LTD., ET AL., DBA PINECREST COUNTRY CLUB *v.* HUSTI ET AL. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. Reported below: 199 Conn. 575, 508 A. 2d 735.

No. 85–1980. NOFFSINGER ET AL. *v.* BANK OF CENTRAL FLORIDA. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 786 F. 2d 1179.

No. 85–1990. STERNER *v.* ANDRE ET AL. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–2005. LEWIS ET AL. *v.* MCMASTERS ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating

the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 776 F. 2d 1053.

No. 85–2046. HORWITZ *v.* STATE BOARD OF MEDICAL EXAMINERS OF COLORADO ET AL. Appeal from Ct. App. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 716 P. 2d 131.

No. 85–2074. BRACY *v.* LABOR AND INDUSTRY REVIEW COMMISSION. Appeal from Ct. App. Wis. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–2083. JUDGE *v.* VIRGINIA ET AL. Appeal from Cir. Ct. Accomack County, Va., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–2129. BERGEN *v.* MARTINDALE-HUBBELL, INC. Appeal from Ct. App. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 176 Ga. App. 745, 337 S. E. 2d 770.

No. 85–6844. PULLEY *v.* SCOTT ET AL. Appeal from Sup. Ct. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–7142. STARADUMSKY *v.* TOMLINSON TRANSPORTATION, INC., ET AL. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–35. POLYAK *v.* HULEN ET AL. (two cases). Appeals from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as a petition for writ of certiorari, certiorari denied. Reported below: 782 F. 2d 1042 (first case); 782 F. 2d 1043 (second case).

No. 86–109. DELUCCHI ET UX. *v.* COUNTY OF SANTA CRUZ ET AL. Appeal from Ct. App. Cal., 6th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 179 Cal. App. 3d 814, 225 Cal. Rptr. 43.

No. 86–136. ISLAMIC REPUBLIC OF IRAN ET AL. *v.* PAHLAVI. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–150. FENENDAEL ET UX. *v.* ZOBEL, BY HANCOX ET AL., GUARDIANS. Appeal from Ct. App. Wis. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 127 Wis. 2d 382, 379 N. W. 2d 887.

No. 86–182. POLYAK *v.* BUFORD EVANS & SONS. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 787 F. 2d 588.

No. 86–213. FIELDS ET AL. *v.* LEWIS ET AL. Appeal from Ct. App. Ky. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–5025. DAWN ET AL. *v.* GREENE ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–5061. PERKINS *v.* HARTIGAN, ATTORNEY GENERAL OF ILLINOIS. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 787 F. 2d 596.

No. 86–5181. IN RE NUEY. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 791 F. 2d 919.

No. 86–5224. VIOLA *v.* ARIZONA. Appeal from Ct. App. Ariz. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–7190. BETKA *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. Appeal from D. C. Ore. dismissed for want of jurisdiction.

No. 86–56. SHOECRAFT *v.* CATHOLIC SOCIAL SERVICES BUREAU, INC., ET AL. Appeal from Sup. Ct. Neb. dismissed as moot. Reported below: 222 Neb. 574, 385 N. W. 2d 448.

Certiorari Granted—Vacated and Remanded

No. 85–1959. UNITED STATES *v.* MCAFEE ET AL. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Henderson* v. *United States*, 476 U. S. 321 (1986). Reported below: 780 F. 2d 143.

Certiorari Dismissed

No. 85–2110. KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. *v.* MATUSIAK. C. A. 2d Cir. Certiorari dismissed in light of the suggestion of death of respondent. Reported below: 786 F. 2d 536.

No. 85–2128. FLORIDA *v.* CROSS. Sup. Ct. Fla. Certiorari dismissed in light of the suggestion of death of respondent. Reported below: 487 So. 2d 1056.

No. 86–5500. ROOK *v.* RICE, WARDEN. C. A. 4th Cir. Certiorari dismissed as moot. Reported below: 813 F. 2d 402.

*Miscellaneous Orders**

No. — — ——. CARTER *v.* WOODRUFF ET AL.; and

No. — — ——. GALIN *v.* DOW CHEMICAL PACIFIC LTD. ET AL. Motions to direct the Clerk to file the petitions for writs of certiorari out of time denied.

No. A–136 (86–173). HARRIS *v.* ATTORNEY GENERAL OF VIRGINIA ET AL. C. A. 4th Cir. Application for bail, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–212. KOWALIK *v.* UNITED STATES. C. A. 10th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–556. IN RE DISBARMENT OF SODOWICK. Michael Samuel Sodowick, of West Caldwell, N. J., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on May 5, 1986 [476 U. S. 1102], is hereby discharged.

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*For Court's order making allotment of Justices, see *ante*, p. II.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Accounting of the Special Master for the Massachusetts Boundary case is received and ordered filed. [For earlier decision herein, see, *e. g.*, 475 U. S. 89.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, if any, may be filed within 30 days. Motion of the Special Master for award of interim fee allowance granted. [For earlier order herein, see, *e. g.*, 475 U. S. 1004.]

No. 84-6811. MCCLESKEY *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir. [Certiorari granted, 478 U. S. 1019.] Motions of Congressional Black Caucus et al., International Human Rights Law Group, and Franklin M. Fisher et al. for leave to file briefs as *amici curiae* granted.

No. 85-129. WIMBERLY *v.* LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI ET AL. Sup. Ct. Mo. [Certiorari granted, 475 U. S. 1118.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-1433. RICHARDSON, WARDEN *v.* MARSH. C. A. 6th Cir. [Certiorari granted, 476 U. S. 1168.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-1630. HEWITT ET AL. *v.* HELMS. C. A. 3d Cir. [Certiorari granted, 476 U. S. 1181.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-1695. SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA. C. A. 8th Cir. [Certiorari granted, 476 U. S. 1168.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-1043. PILOT LIFE INSURANCE CO. *v.* DEDEAUX. C. A. 5th Cir. [Certiorari granted, 478 U. S. 1004.] Motion of

American Council of Life Insurance et al. for leave to file a brief as *amici curiae* granted.

No. 85–1199. FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE *v.* COUNTY OF LOS ANGELES, CALIFORNIA. Ct. App. Cal., 2d App. Dist. [Probable jurisdiction noted, 478 U. S. 1003.] Further consideration of the motion of appellee to dismiss the appeal is deferred to the hearing of the case on the merits.

No. 85–1200. CALIFORNIA COASTAL COMMISSION ET AL. *v.* GRANITE ROCK CO. C. A. 9th Cir. [Probable jurisdiction postponed, 475 U. S. 1094.] Further consideration of the motion of appellee to strike portions of the brief and appendix of the Big Sur Foundation et al. as *amici curiae* is deferred to the hearing of the case on the merits. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–1206. ROSE *v.* ROSE ET AL. Ct. App. Tenn. [Probable jurisdiction noted, 478 U. S. 1003.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of appellees for divided argument granted.

No. 85–1239. AMOCO PRODUCTION CO. ET AL. *v.* VILLAGE OF GAMBELL ET AL.; and

No. 85–1406. HODEL, SECRETARY OF THE INTERIOR, ET AL. *v.* VILLAGE OF GAMBELL ET AL. C. A. 9th Cir. [Certiorari granted, 476 U. S. 1157.] Motion of the Solicitor General for divided argument granted.

No. 85–1358. LUKHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF SOCIAL SERVICES *v.* REED ET AL. C. A. 4th Cir. [Certiorari granted, 477 U. S. 903.] Motion of the Solicitor General for divided argument granted.

No. 85–1329. YOUNG ET AL. *v.* UNITED STATES EX REL. VUITTON ET FILS S. A. ET AL. C. A. 2d Cir. [Certiorari granted, 477 U. S. 903.] Motion of petitioner Sol N. Klaymine to proceed further herein *in forma pauperis* granted.

No. 85–1347. PENNSYLVANIA *v.* RITCHIE. Sup. Ct. Pa. [Certiorari granted, 476 U. S. 1139.] Motion of Sunny von Bulow

National Victim Advocacy Center, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 85–1384. TURNER ET AL. *v.* SAFLEY ET AL. C. A. 8th Cir. [Certiorari granted, 476 U. S. 1139.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 85–1520. ANDERSON *v.* CREIGHTON ET AL. C. A. 8th Cir. [Certiorari granted, 478 U. S. 1003.] Motion of Ronald I. Meshbesher, Esquire, to permit John P. Sheehy, Esquire, to present oral argument *pro hac vice* granted.

No. 85–1656. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* PETTY. C. A. 5th Cir. [Certiorari granted, 478 U. S. 1003.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that John R. Breihan, Esquire, of Austin, Tex., be appointed to serve as counsel for respondent in this case.

No. 85–1740. KANANEN ET UX. *v.* SUN BANK OKEECHOBEE, FKA COMMERCIAL BANK OKEECHOBEE, FLORIDA, ET AL., 476 U. S. 1182. Motion of respondent for damages denied.

No. 85–1877. AZL RESOURCES, INC. *v.* MARGARET HALL FOUNDATION, INC., ET AL. C. A. 1st Cir.;

No. 85–1910. BUSINESS ELECTRONICS CORP. *v.* SHARP ELECTRONICS CORP. C. A. 5th Cir.;

No. 85–2094. SHARP ELECTRONICS CORP. *v.* BUSINESS ELECTRONICS CORP. C. A. 5th Cir.;

No. 85–2079. LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA ET AL. *v.* ADVANCED LIGHTWEIGHT CONCRETE CO., INC. C. A. 9th Cir.;

No. 86–49. AMERICAN ELECTRIC POWER CO., INC., ET AL. *v.* KENTUCKY PUBLIC SERVICE COMMISSION ET AL. C. A. 6th Cir.; and

No. 86–61. COMMONWEALTH ELECTRIC CO. *v.* DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS. Sup. Jud. Ct. Mass. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 86–21. IMMIGRATION AND NATURALIZATION SERVICE *v.* HECTOR. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 86–5082. WRENN *v.* OHIO DEPARTMENT OF MENTAL HEALTH ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 27, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86–5271. BROWN *v.* SCHWEITZER ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 27, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–2082. IN RE GRACE. C. A. 8th Cir. Petition for writ of common-law certiorari denied. Reported below: 794 F. 2d 679.

No. 85–7191. IN RE PLUMMER ET UX. C. A. 3d Cir. Petition for writ of common-law certiorari denied.

No. 85–6982. IN RE BEACH;
No. 85–7027. IN RE WEYGANDT;
No. 85–7060. IN RE SIZEMORE;
No. 85–7225. IN RE MCDONALD;
No. 86–5075. IN RE BAILEY;
No. 86–5351. IN RE BRYANT; and
No. 86–5401. IN RE MANDEVILLE. Petitions for writs of habeas corpus denied.

No. 85–1891. IN RE PHINNEY;
No. 85–1991. IN RE POLYAK;
No. 85–2081. IN RE GRACE;
No. 85–2171. IN RE BARTSCH ET AL.;
No. 85–6723. IN RE JAMES;
No. 85–6983. IN RE DAWSON;
No. 85–6986. IN RE CLARK;
No. 85–7077. IN RE WALDEN;
No. 85–7079. IN RE CUZICK;
No. 86–217. IN RE SMITH ET AL.;
No. 86–5032. IN RE WILSON;
No. 86–5042. IN RE SINGLETON;
No. 86–5139. IN RE RUBIN;
No. 86–5217. IN RE MEADOWS; and
No. 86–5267. IN RE COOK. Petitions for writs of mandamus denied.

No. 85–6938. IN RE STARGELL;
No. 85–6952. IN RE ZURKOWSKY;
No. 85–7098. IN RE NELSON;
No. 85–7117. IN RE NOLL; and
No. 86–162. IN RE BAKER, SECRETARY OF THE TREASURY, ET AL. Petitions for writs of mandamus and/or prohibition denied.

No. 85–6935. IN RE WRIGHT ET UX.; and
No. 85–7215. IN RE WENDT. Petitions for writs of prohibition denied.

Probable Jurisdiction Noted

No. 85–1963. TYLER PIPE INDUSTRIES, INC. *v.* WASHINGTON STATE DEPARTMENT OF REVENUE; and
No. 85–2006. NATIONAL CAN CORP. ET AL. *v.* WASHINGTON STATE DEPARTMENT OF REVENUE. Appeals from Sup. Ct. Wash. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE POWELL took no part in the consideration or decision of these cases.* Reported below: No. 85–1963, 105 Wash. 2d 318, 715 P. 2d 123; No. 85–2006, 105 Wash. 2d 327, 732 P. 2d 134.

No. 86–71. CTS CORP. *v.* DYNAMICS CORPORATION OF AMERICA; and

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*See also note, p. 801.

No. 86–97. INDIANA *v.* DYNAMICS CORPORATION OF AMERICA. Appeals from C. A. 7th Cir. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 794 F. 2d 250.

No. 86–243. CITY OF HOUSTON, TEXAS *v.* HILL. Appeal from C. A. 5th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 789 F. 2d 1103.

Certiorari Granted

No. 85–1716. WELCH *v.* TEXAS DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 780 F. 2d 1268.

No. 85–1735. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* OUTBOARD MARINE CORP. C. A. 7th Cir. Certiorari granted. Reported below: 773 F. 2d 883.

No. 85–1924. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340. C. A. 9th Cir. Certiorari granted. Reported below: 780 F. 2d 1489.

No. 85–1940. UNITED STATES *v.* CHEROKEE NATION OF OKLAHOMA. C. A. 10th Cir. Certiorari granted. Reported below: 782 F. 2d 871.

No. 85–1987. SEE ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. Reported below: 784 F. 2d 857.

No. 85–2039. UNITED STATES *v.* JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHNSON. C. A. 11th Cir. Certiorari granted. Reported below: 779 F. 2d 1492.

No. 85–2067. UNITED STATES *v.* MENDOZA-LOPEZ ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 781 F. 2d 111.

No. 85–2116. PUERTO RICO *v.* BRANSTAD, GOVERNOR OF IOWA, ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 787 F. 2d 423.

No. 85–2121. ARIZONA *v.* MAURO. Sup. Ct. Ariz. Certiorari granted. Reported below: 149 Ariz. 24, 716 P. 2d 393.

No. 86–39. BURLINGTON NORTHERN RAILROAD CO. ET AL. *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 793 F. 2d 795.

No. 86–44. SHEARSON/AMERICAN EXPRESS INC. ET AL. *v.* MCMAHON ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 788 F. 2d 94.

No. 86–80. NEW YORK *v.* BURGER. Ct. App. N. Y. Certiorari granted. Reported below: 67 N. Y. 2d 338, 493 N. E. 2d 926.

No. 86–104. BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES ET AL. *v.* JEWS FOR JESUS, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 785 F. 2d 791.

No. 85–1973. POPE ET AL. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari granted limited to Question 2 presented by the petition. Reported below: 138 Ill. App. 3d 726, 486 N. E. 2d 350.

No. 85–2099. PENNSYLVANIA *v.* FINLEY. Super. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 330 Pa. Super. 313, 479 A. 2d 568.

No. 86–6. RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMSON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 789 F. 2d 722.

No. 85–2156. SHAARE TEFILA CONGREGATION ET AL. *v.* COBB ET AL. C. A. 4th Cir. Motion of Anti-Defamation League of B'nai B'rith et al. for leave to file a brief as *amici curiae* granted. Motion of respondent Michael David Remer for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument in tandem with No. 85–2169, *St. Francis College* v. *Al-Khazraji*, immediately *infra*. Reported below: 785 F. 2d 523.

No. 85–2169. SAINT FRANCIS COLLEGE ET AL. *v.* AL-KHAZRAJI, AKA ALLAN. C. A. 3d Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition and case set for oral argument in tandem with No. 85–2156, *Shaare Tefila Congregation* v. *Cobb*, immediately *supra*. Reported below: 784 F. 2d 505.

No. 85–6790. GRANBERRY *v.* GREER, WARDEN. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 780 F. 2d 14.

Certiorari Denied. (See also Nos. 85–1980, 85–1990, 85–2005, 85–2046, 85–2074, 85–2083, 85–2129, 85–6844, 85–7142, 86–35, 86–109, 86–136, 86–150, 86–182, 86–213, 86–5025, 86–5061, 86–5181, 86–5224, 85–2082, and 85–7191, *supra.*)

No. 85–1535. VEREZ ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 230 Va. 405, 337 S. E. 2d 749.

No. 85–1565. VAUGHT *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 85–1568. ARTIS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 15.

No. 85–1571. MACDONALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 962.

No. 85–1588. GERMANN *v.* CITY OF KANSAS CITY, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 776 F. 2d 761.

No. 85–1604. UTAH *v.* PACHECO. Sup. Ct. Utah. Certiorari denied. Reported below: 712 P. 2d 192.

No. 85–1620. HOEFT *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 137 Ill. App. 3d 1169, 499 N. E. 2d 183.

No. 85–1654. MYERS *v.* MISSISSIPPI STATE BAR. Sup. Ct. Miss. Certiorari denied. Reported below: 480 So. 2d 1080.

No. 85–1668. UNDERHILL, DBA EASTSIDE MOTORS, ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 781 F. 2d 64.

No. 85–1678. CARNEY, DIRECTOR OF EMPLOYEE RELATIONS FOR THE CITY OF GARLAND, ET AL. *v.* WHITAKER. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 216.

No. 85–1696. WHITNEY ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 963.

No. 85–1704. WOOL *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 3.

No. 85–1707. MOODY ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 150.

No. 85–1721. SCHAUT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85–1727. SHERROD ET AL., CO-EXECUTORS OF THE ESTATE OF SHERROD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1057.

No. 85–1728. GARCIA *v.* BOARD OF EDUCATION OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 777 F. 2d 1403.

No. 85–1730. NEW JERSEY *v.* HACKETT. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85–1737. LOVE *v.* SUMMIT COUNTY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 776 F. 2d 908.

No. 85–1741. AMERICAN MINING CONGRESS ET AL. *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; and

No. 85–1748. SECONDARY LEAD SMELTERS ASSN., INC., ET AL. *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 445.

No. 85–1742. RAWL, ADMINISTRATOR OF THE ESTATE OF RAWL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 778 F. 2d 1009.

No. 85–1743. TEAMSTER'S LOCAL 317 *v.* CLINTON'S DITCH COOPERATIVE CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 778 F. 2d 132.

No. 85–1745. PERRY *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 781 F. 2d 1294.

No. 85–1751. OTTMAN CUSTOM PROCESSORS, INC., ET AL. *v.* BROCK, SECRETARY OF LABOR. C. A. 1st Cir. Certiorari denied. Reported below: 783 F. 2d 8.

No. 85–1759. TEXAS *v.* ADLEY. Ct. Crim. App. Tex. Certiorari denied. Reported below: 718 S. W. 2d 682.

No. 85–1762. MARYLAND CUP CORP. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 785 F. 2d 471.

No. 85–1763. FLORENCE NIGHTINGALE NURSING HOME *v.* PERALES, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 782 F. 2d 26.

No. 85–1778. UNITED FOOD & COMMERCIAL WORKERS, LOCAL 626 *v.* KROGER CO. C. A. 6th Cir. Certiorari denied. Reported below: 778 F. 2d 1171.

No. 85–1779. SYNANON CHURCH *v.* BERNSTEIN ET AL. Ct. App. D. C. Certiorari denied. Reported below: 503 A. 2d 1254.

No. 85–1782. DEPAUW *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION. C. A. Fed. Cir. Certiorari denied. Reported below: 782 F. 2d 1564.

No. 85–1788. MCCLENDON ET UX. *v.* SHELBY COUNTY, ALABAMA, ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 484 So. 2d 459.

No. 85–1789. WINICKI ET AL. *v.* MALLARD, PROPERTY APPRAISER OF DUVAL COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 1567.

No. 85–1790. COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 783 F. 2d 29.

No. 85–1791. THOMAS *v.* WILLIS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1148.

No. 85–1796. HICKERSON *v.* VELSICOL CHEMICAL CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 778 F. 2d 365.

No. 85–1797. MACK ET AL. *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 784 F. 2d 438.

No. 85–1802. EASTON ET AL. *v.* CITY OF BOULDER, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 776 F. 2d 1441.

No. 85–1806. FRANZEN, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. *v.* DUCKWORTH ET AL.; and
No. 85–1820. DUCKWORTH ET AL. *v.* FRANZEN, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 780 F. 2d 645.

No. 85–1815. BUNDRICK ET AL. *v.* UNITED STATES; and
No. 85–1938. ALDER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: No. 85–1815, 785 F. 2d 1009; No. 85–1938, 785 F. 2d 1004.

No. 85–1819. CESTARO *v.* CORCORAN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 115 App. Div. 2d 1015, 496 N. Y. S. 2d 595.

No. 85–1826. ALINOVI *v.* WORCESTER SCHOOL COMMITTEE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 777 F. 2d 776.

No. 85–1829. ACRI ET AL. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 781 F. 2d 1393.

No. 85–1842. COVERT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 85–1849. WALKER ET AL. *v.* IOWA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 780 F. 2d 720.

No. 85–1854. BANKS *v.* FINLEY-SELIGMAN & LATZ, INC. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1049.

No. 85–1856. JAYCO SYSTEMS, INC. *v.* SAVIN BUSINESS MACHINES CORP. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 306.

No. 85–1860. COWLES ET AL. *v.* DOW KEITH OIL & GAS, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 752 F. 2d 508.

No. 85–1861. SHOKRIAN *v.* CARROLL, CHIEF OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85–1866. CSEA LOCAL UNION 1000, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL–CIO *v.* BROCK, SECRETARY OF LABOR, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 784 F. 2d 98.

No. 85–1867. GREAT AMERICAN AIRWAYS *v.* NEVADA STATE TAX COMMISSION. Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 422, 705 P. 2d 654.

No. 85–1868. ATLANTIC RICHFIELD CO. *v.* INTERSTATE OIL TRANSPORT CO. C. A. 2d Cir. Certiorari denied. Reported below: 784 F. 2d 106.

No. 85–1870. ROLLESTON *v.* ROSE HALL (DEVELOPMENTS) LTD. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1148.

No. 85–1871. MITCHELL *v.* CODY, ATTORNEY GENERAL OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 783 F. 2d 669.

No. 85–1873. JONES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 1038.

No. 85–1878. BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY ET AL. *v.* AUBURN UNIVERSITY ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–1881. STANTON *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. C. A. D. C. Cir. Certiorari denied. Reported below: 251 U. S. App. D. C. 196, 782 F. 2d 278.

No. 85–1882. SCINTO *v.* STAMM ET AL. C. A. 2d Cir. Certiorari denied.

No. 85–1885. GOOD'S FURNITURE HOUSE, INC. *v.* IOWA STATE BOARD OF TAX REVIEW. Sup. Ct. Iowa. Certiorari denied. Reported below: 382 N. W. 2d 145.

No. 85–1887. FENNELL *v.* WARNER LAMBERT CO. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 3.

No. 85–1888. OWENS ET AL. *v.* FRENCH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 2d 1250.

No. 85–1889. ZACHARY ET AL. *v.* WILK ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 173 Cal. App. 3d 754, 219 Cal. Rptr. 122.

No. 85–1893. EISENBERGER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 177 Ga. App. 673, 340 S. E. 2d 232.

No. 85–1896. DELUSIGNAN *v.* GOULD, RECEIVER-TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 829.

No. 85–1904. KINNEY *v.* KINNEY. App. Ct. Conn. Certiorari denied. Reported below: 5 Conn. App. 484, 500 A. 2d 569.

No. 85–1905. YONG BING-NAM, AKA PIAN-NAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 4.

No. 85–1906. ALANIZ *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1111.

No. 85–1907. RICE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 1359.

No. 85–1908. WESLEY *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 17 Ark. App. xxi.

No. 85–1913. BAUER ET AL. *v.* COASTSIDE PUBLISHERS & PRINTERS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–1914. LAROUCHE *v.* NATIONAL BROADCASTING CO., INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 1134.

No. 85–1916. ALONSO *v.* GRAND NATIONAL BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1173.

No. 85–1918. L. B. G. PROPERTIES, INC. *v.* CHISHOLM REALTY CO., LTD. C. A. 11th Cir. Certiorari denied.

No. 85–1921. MAURIELLO *v.* UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 781 F. 2d 46.

No. 85–1923. KAMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 781 F. 2d 1380.

No. 85–1925. CEMENTCRAFT, INC. *v.* CONCRETE UNLIMITED, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1537.

No. 85–1927. PECK, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RATLIFF, ET AL. *v.* M/V MORRIS HARVEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1156.

No. 85–1929. RAJARAM *v.* A. S. ABELL PUBLISHING CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1036.

No. 85–1930. HUMBLE EXPLORATION CO., INC. *v.* PHILLIPS PETROLEUM, INC. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 1039.

No. 85–1932. LAFOUNTAIN *v.* TOWN OF SARATOGA, WYOMING, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–1933. BOUND BROOK ASSN. ET AL. *v.* CITY OF NORWALK ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 198 Conn. 660, 504 A. 2d 1047.

No. 85–1934. DIGICOURSE, INC. *v.* AMA DISTRIBUTORS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 93.

No. 85–1935. JOHNSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85–1936. LORD ELECTRIC CO., INC. *v.* UNITED STATES;
No. 85–1942. W. V. PANGBORNE & CO., INC., ET AL. *v.* UNITED STATES; and
No. 85–1950. SARGENT ELECTRIC CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 785 F. 2d 1123.

No. 85–1937. GIOFFRE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 584.

No. 85–1941. MISSISSIPPI *v.* NEALY. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 1362.

No. 85–1944. MARABLE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 179.

No. 85–1945. BOWIE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 453.

No. 85–1947. KAUFMAN *v.* McCRORY STORES DIVISION OF McCRORY CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 792 F. 2d 138.

No. 85–1951. INDIUM CORPORATION OF AMERICA *v.* SEMI-ALLOYS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 781 F. 2d 879.

No. 85–1954. ARRIOLA ET AL. *v.* HARVILLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 506.

No. 85–1958. NOLAN ET AL. *v.* OTIS ELEVATOR CO. ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 102 N. J. 30, 505 A. 2d 580.

No. 85–1960. DURDEN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 320.

No. 85–1964. AMERICAN HOSPITAL ASSN. ET AL. *v.* HEYDINGER, DIRECTOR OF THE WEST VIRGINIA DEPARTMENT OF HEALTH. C. A. 4th Cir. Certiorari denied. Reported below: 783 F. 2d 1184.

No. 85–1966. 8.41 ACRES OF LAND, MORE OR LESS, SITUATED IN ORANGE COUNTY, TEXAS, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1256.

No. 85–1967. HOLLINGSWORTH OIL CO. ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1044.

No. 85–1968. CAMBRIDGE WIRE CLOTH CO. *v.* LAITRAM CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 292.

No. 85–1970. EHAT *v.* TANNER ET AL., DBA MODERN MICROFILM CO. C. A. 10th Cir. Certiorari denied. Reported below: 780 F. 2d 876.

No. 85–1971. MOUSSEAU *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 94.

No. 85–1975. POLYAK *v.* HULEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1042.

No. 85–1977. OIL INSURANCE LTD. *v.* SUPERIOR COURT OF CALIFORNIA, SAN MATEO COUNTY (A. I. U. INSURANCE CO. ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 177 Cal. App. 3d 281, 222 Cal. Rptr. 880.

No. 85–1981. GREGORY MARKETING CORP. ET AL. *v.* WAKEFERN FOOD CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 92.

No. 85–1983. CARRION *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85–1988. FONDO *v.* MISODI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 5.

No. 85–1989. CROWN ZELLERBACH CORP. *v.* INGRAM INDUSTRIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1296.

No. 85–1992. BRIGGS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 781 F. 2d 1008.

No. 85–1993. JACKSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 238 Kan. 793, 714 P. 2d 1368.

No. 85–1994. TUCKER *v.* MARCUS, JUSTICE, SUPREME COURT OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 654.

No. 85–1996. FORSYTHE *v.* JONES & LAUGHLIN STEEL CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 581.

No. 85–1997. LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* HARVSTONE MANUFACTURING CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 785 F. 2d 570.

No. 85–1998. TABLER ET AL. *v.* WALLACE, ADMINISTRATRIX OF THE ESTATE OF WALLACE, ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 704 S. W. 2d 179.

No. 85–1999. CITY OF COLLEGE STATION ET AL. *v.* SHELTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 475.

No. 85–2000. GRIJALVA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 472.

No. 85–2003. INGRAM *v.* UNITED STATES; and
No. 85–2150. BRANTLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 777 F. 2d 159.

No. 85–2004. GELTMAN INDUSTRIES, INC. *v.* TRUSTEES OF THE AMALGAMATED INSURANCE FUND. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 926.

No. 85–2007. SUMNER *v.* YODER TOWNSHIP ET AL. Ct. App. Kan. Certiorari denied. Reported below: 10 Kan. App. 2d xlvii, 710 P. 2d 32.

No. 85–2008. BROWN *v.* ROGERS ET AL. C. A. 4th Cir. Certiorari denied.

No. 85–2011. KLIPPERT *v.* DEPARTMENT OF DEFENSE. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 92.

No. 85–2012. CONNICK *v.* TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 1018.

No. 85–2013. CARRAS *v.* HULL & SMITH HORSE VANS, INC. Ct. App. Mich. Certiorari denied. Reported below: 144 Mich. App. 712, 376 N. W. 2d 392.

No. 85–2016. OWENS *v.* BALTIMORE & OHIO RAILROAD CO. Ct. Sp. App. Md. Certiorari denied. Reported below: 65 Md. App. 779.

No. 85–2017. GIOVANIELLO *v.* BOARD OF DIRECTORS OF CENTENNIAL INDUSTRIES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 5.

No. 85–2018. KUNGLE *v.* ST. JOHN'S COLLEGE ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 65 Md. App. 776.

No. 85–2020. EMBURY *v.* SUPREME COURT OF COLORADO ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–2021. GREER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 338.

No. 85–2022. INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 786 F. 2d 370.

No. 85–2024. BAIE *v.* SECRETARY OF DEFENSE. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 1375.

No. 85–2025. PERNA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 1506.

No. 85–2026. MICHIGAN *v.* JOHNSON. Ct. App. Mich. Certiorari denied. Reported below: 147 Mich. App. 542, 382 N. W. 2d 816.

No. 85–2029. PADIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 1071.

No. 85–2030. ROLAND ET AL. *v.* KLINGENBERG. Ct. App. Ky. Certiorari denied.

No. 85–2032. KUPAU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 781 F. 2d 740.

No. 85–2035. SIEGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 85–2036. UNION ELECTRIC CO. *v.* HARRIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 787 F. 2d 355.

No. 85–2037. BRADY *v.* COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 85–2038. KISER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 288 S. C. 441, 343 S. E. 2d 292.

No. 85–2040. MURFF, ADMINISTRATOR OF THE ESTATE OF MURFF, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 785 F. 2d 552.

No. 85–2041. COLONY SQUARE CO. *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA (two cases). C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 739 (first case); 779 F. 2d 653 (second case).

No. 85–2042. CARBONE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 117 App. Div. 2d 612, 498 N. Y. S. 2d 74.

No. 85–2043. HOFFART *v.* TEXAS. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 686 S. W. 2d 259.

No. 85–2044. USTRAK *v.* FAIRMAN. C. A. 7th Cir. Certiorari denied. Reported below: 781 F. 2d 573.

No. 85–2045. COSME NIEVES ET AL. *v.* DESHLER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 786 F. 2d 445.

No. 85–2048. PELLERIN *v.* TUDOR CONSTRUCTION CO. ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 479 So. 2d 498.

No. 85–2050. JOHNSON & JOHNSON PRODUCTS, INC. *v.* WEST. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 174 Cal. App. 3d 831, 220 Cal. Rptr. 437.

No. 85–2051. JENSEN *v.* SATRAN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 85–2052. WOOD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 929.

No. 85–2053. SCHNEIDER ET AL. *v.* CITY OF EAST ORANGE ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 103 N. J. 115, 510 A. 2d 1118.

No. 85–2054. DEAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 535.

No. 85–2055. BROWN ET AL. *v.* SHELL OIL CO. Ct. App. Mich. Certiorari denied. Reported below: 128 Mich. App. 111, 339 N. W. 2d 709.

No. 85–2056. YANOPOULOS *v.* DEPARTMENT OF THE NAVY ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 796 F. 2d 468.

No. 85–2058. ELIZEY *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85–2059. WINSLOW *v.* BOARD OF MORGAN COUNTY COMMISSIONERS. Ct. App. Colo. Certiorari denied. Reported below: 717 P. 2d 1003.

No. 85–2061. GAMBINO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 788 F. 2d 938.

No. 85–2063. RIGGS *v.* ORR, SECRETARY OF THE AIR FORCE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1175.

No. 85–2066. DOYLE ET AL. *v.* SUFFOLK COUNTY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 786 F. 2d 523.

No. 85–2069. WEXLER ET UX., INDIVIDUALLY AND ON BEHALF OF THEIR CHILD, WEXLER *v.* WESTFIELD BOARD OF EDUCATION. C. A. 3d Cir. Certiorari denied. Reported below: 784 F. 2d 176.

No. 85–2070. O'CONNOR *v.* PRINS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 309.

No. 85–2072. SANDS *v.* CUNNINGHAM, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 85–2075. PATZER ET AL. *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 382 N. W. 2d 631.

No. 85–2076. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 782 F. 2d 178.

No. 85–2078. THUNA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 786 F. 2d 437.

No. 85–2080. GRACE *v.* HEARTLAND TRANSPORTATION, INC. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1048.

No. 85–2084. COFFEY ET AL. *v.* PIERSON ET UX. Ct. App. Ky. Certiorari denied. Reported below: 706 S. W. 2d 409.

No. 85–2085. BEAUDRY MOTOR CO. *v.* ABKO PROPERTIES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 751.

No. 85–2086. PIETSCH *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 6.

No. 85–2087. LAWRENCE ET UX. *v.* ADVANCED PATENT TECHNOLOGY, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 787 F. 2d 597.

No. 85–2088. ROGER'S TERMINAL & SHIPPING CORP. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 687.

No. 85–2090. DICUPE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 440.

No. 85–2091. UNION OIL COMPANY OF CALIFORNIA *v.* SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY (BUCHANAN, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85–2092. BRADFORD, AS EXECUTRIX OF THE ESTATE OF BRADFORD, ET AL. *v.* BLUE PEARL MUSIC CORP. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 580.

No. 85–2093. MOTE ET AL. *v.* BISHOP AND DIOCESE OF COLORADO ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 716 P. 2d 85.

No. 85–2095. RODOLITZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 786 F. 2d 77.

No. 85–2096. KRUEGER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 210.

No. 85–2097. WEISSER OPTICAL CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 787 F. 2d 596.

No. 85–2098. RUSSELL *v.* MILLSAP ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 381.

No. 85–2100. GORDON *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 92.

No. 85–2101. SERRA *v.* PICARDO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 237.

No. 85-2103. UTILITY CONTRACTORS, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 90.

No. 85-2104. WINTRISS *v.* WINTRISS. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-2105. DELAPLANE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 778 F. 2d 570.

No. 85-2106. OHIO *v.* PI KAPPA ALPHA FRATERNITY. Sup. Ct. Ohio. Certiorari denied. Reported below: 23 Ohio St. 3d 141, 491 N. E. 2d 1129.

No. 85-2108. BIASUCCI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 786 F. 2d 504.

No. 85-2109. LERAKOLI, INC., ET AL. *v.* PAN AMERICAN WORLD AIRWAYS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 783 F. 2d 33.

No. 85-2111. TEEPLE *v.* PATTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 792 F. 2d 141.

No. 85-2113. A. H. ROBINS CO., INC. *v.* ELI LILLY & CO. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 95.

No. 85-2114. BELL ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN RESOURCES ET AL. Sup. Ct. La. Certiorari denied. Reported below: 483 So. 2d 945.

No. 85-2117. ROBINSON *v.* DAUGHERTY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 310.

No. 85-2118. PUGLISI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 790 F. 2d 240.

No. 85-2119. BLOCK DRUG CO., INC., ET AL. *v.* HODOSH ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 786 F. 2d 1136.

No. 85-2120. WHEELER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 76.

No. 85-2124. CAPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 786 F. 2d 504.

No. 85–2125. MAGIDOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 318.

No. 85–2126. MALACHOWSKI ET UX. *v.* CITY OF KEENE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 787 F. 2d 704.

No. 85–2127. MCDANIEL *v.* JOHNSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 386.

No. 85–2130. AKERS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 814.

No. 85–2131. LEVY AUTO PARTS OF CANADA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 787 F. 2d 946.

No. 85–2132. KEHOE *v.* HOFMANN. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 582.

No. 85–2135. HARDIN *v.* GILBERT & COLVIN (two cases). C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1111 (first case); 786 F. 2d 1160 (second case).

No. 85–2136. CITY CAB COMPANY OF ORLANDO, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. Certiorari denied. Reported below: 787 F. 2d 1475.

No. 85–2138. TOWNSHIP OF WOODBRIDGE *v.* TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 117.

No. 85–2139. CHEMICAL ENGINEERING CORP. ET AL. *v.* PATERSON ET AL. Ct. App. Mich. Certiorari denied.

No. 85–2140. DINOLA *v.* AMERICAN CYANAMID ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–2142. SOUTHWEST SUNSITES, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 1431.

No. 85–2143. JOHNSON *v.* PATTESON. C. A. 8th Cir. Certiorari denied. Reported below: 787 F. 2d 1245.

No. 85–2144. CITY OF NEW YORK *v.* SMOSS ENTERPRISES CORP. C. A. 2d Cir. Certiorari denied.

No. 85–2145. MARICLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1179.

No. 85–2146. QUEMENER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 789 F. 2d 145.

No. 85–2148. HALE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 1465.

No. 85–2149. CRAFT ET AL. *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 140.

No. 85–2151. NISIOTAKIS ET AL. *v.* COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1155.

No. 85–2152. BAGGIANO, COMMISSIONER, ALABAMA MEDICAID AGENCY, ET AL. *v.* ALACARE, INC.–NORTH. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 963.

No. 85–2153. BROTHERHOOD OF LOCOMOTIVE ENGINEERS *v.* BOSTON & MAINE CORP.; and

No. 86–160. BOSTON & MAINE CORP. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS. C. A. 1st Cir. Certiorari denied. Reported below: 788 F. 2d 794.

No. 85–2154. ARMSTRONG RUBBER CO. ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied.

No. 85–2158. BOWER ET AL. *v.* LYNG, SECRETARY OF AGRICULTURE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 556.

No. 85–2159. THOMPSON *v.* HOUSING AUTHORITY OF THE CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 829.

No. 85–2160. TOWN OF NORWOOD *v.* UNCOMPAHGRE VALLEY WATER USERS ASSN. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 785 F. 2d 269.

No. 85–2162. SANDHU *v.* VIRGINIA STATE WATER CONTROL BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1156.

No. 85–2163. JOHNSON, ADMINISTRATOR OF THE ESTATE OF JOHNSON *v.* COLLEY ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 111 Ill. 2d 468, 490 N. E. 2d 685.

No. 85–2165. DAMASCUS *v.* PACIFIC BELL CO. ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 85–2166. MIDDLETON ET AL. *v.* CALIFORNIA ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 85–2167. BABAD ET AL., A CO-PARTNERSHIP DBA J. R. R. REALTY CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 785 F. 2d 46.

No. 85–6467. CONLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 970.

No. 85–6514. VERTZ *v.* TEXAS. Ct. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 686 S. W. 2d 696.

No. 85–6546. DIAZ *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85–6572. BOUDREAUX *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 85–6575. GUTHRIE *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 50.

No. 85–6603. AZZOUKA *v.* SAVA, DISTRICT DIRECTOR OF THE NEW YORK DISTRICT, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 777 F. 2d 68.

No. 85–6604. JONAS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 779 F. 2d 1576.

No. 85–6612. THOMPSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 711 P. 2d 936.

No. 85–6622. DUKES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 53.

No. 85–6627. BROWN *v.* WESLEY QUAKER MAID, INC. C. A. 6th Cir. Certiorari denied. Reported below: 771 F. 2d 952.

No. 85-6637. LEAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 1108.

No. 85-6646. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1032.

No. 85-6653. RUSSO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1149.

No. 85-6654. MARRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 778 F. 2d 985.

No. 85-6680. CLARK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 402.

No. 85-6693. COVINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1052.

No. 85-6704. WEICHERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 783 F. 2d 23.

No. 85-6715. HELMY *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 582.

No. 85-6732. HANKINS *v.* WICKER. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1028.

No. 85-6752. BREWER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 841.

No. 85-6762. BROWN *v.* ANDERSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1034.

No. 85-6768. RAMIREZ *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 353.

No. 85-6769. MCNEAIR *v.* GEORGETOWN UNIVERSITY HOSPITAL. C. A. D. C. Cir. Certiorari denied. Reported below: 251 U. S. App. D. C. 196, 782 F. 2d 278.

No. 85-6777. HAYES *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 488 So. 2d 77.

No. 85-6778. PORTER *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 934.

No. 85-6781. AHMAD *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 409.

No. 85–6791. HEMPHILL *v.* LYLES, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 45.

No. 85–6793. GOUDY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 495 A. 2d 744 and 505 A. 2d 461.

No. 85–6796. SHAFFER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1149.

No. 85–6797. CRADDOCK *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85–6815. LOCKETT *v.* MONTEMANGO, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 784 F. 2d 78.

No. 85–6816. CODINACH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 2d 791.

No. 85–6817. DUNN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 703 S. W. 2d 874.

No. 85–6821. STRANGE *v.* LOCAL UNION NO. 79 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85–6832. HUSKEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85–6835. MADDOX *v.* WELDON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 1035.

No. 85–6837. KEATON *v.* ARREDONDO. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 1038.

No. 85–6842. JONES *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 85–6847. CASEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 1056.

No. 85–6873. WILLIAMS *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1159.

No. 85–6878. WILSON *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 779 F. 2d 656.

No. 85-6882. VETETO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 85-6883. BUCKMORE *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 321.

No. 85-6892. IBEMESI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1157.

No. 85-6893. BABICH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 785 F. 2d 415.

No. 85-6897. CLARK *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1020.

No. 85-6901. THOMAS *v.* CITY OF DALLAS POLICE DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-6903. BARBOUR *v.* HOLLAND, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1034.

No. 85-6904. STRICKLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 1166.

No. 85-6906. GAUGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-6909. KLAVER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 487 So. 2d 1117.

No. 85-6915. LAFIURA *v.* DEROBERTIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-6916. WILLIAMS *v.* NELLO L. TEER CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1159.

No. 85-6919. JOHNSON *v.* COSTA. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 1160.

No. 85-6920. CURREY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 115 App. Div. 2d 552, 496 N. Y. S. 2d 695.

No. 85-6921. BLAKEWOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 1160.

No. 85-6926. BECKER *v.* GOVERNMENT OF BRAZIL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85-6928. CLARK *v.* BRUCE, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1034.

No. 85-6929. MUZA *v.* MUZA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1172.

No. 85-6934. SALMAN *v.* ONE THIRTY-THREE, INC., DBA ONSLOW HOTEL/CASINO, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 102 Nev. 748.

No. 85-6937. MAY *v.* INTERNATIONAL BUSINESS ASSOCIATES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 934.

No. 85-6939. RANKIN *v.* RICE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1036.

No. 85-6940. LEE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6941. BASALYGA *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 580.

No. 85-6942. GAMBRELL *v.* FORD MOTOR CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 581.

No. 85-6944. CLARK *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 680.

No. 85-6945. ESPEY *v.* WAINWRIGHT, SECRETARY, FLORDIA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 1569.

No. 85-6946. DANIELS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 66 Md. App. 814.

No. 85-6949. DOSS *v.* REID ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-6951. WELLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1158.

No. 85-6953. THOMAS *v.* UNITED STATES MARSHAL, LEXINGTON, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1166.

No. 85-6955. TERRELL *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 323.

No. 85-6957. FLOWERS *v.* COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-6959. HALLINGSTAD *v.* HARVEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 787 F. 2d 596.

No. 85-6960. MAXHAM *v.* DEPARTMENT OF THE NAVY. C. A. 4th Cir. Certiorari denied.

No. 85-6965. SMITH *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 5.

No. 85-6966. CROCKETT *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 423.

No. 85-6968. KOHR *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1029.

No. 85-6969. AZZOLINO ET AL. *v.* DINGFELDER ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 315 N. C. 103, 337 S. E. 2d 528.

No. 85-6972. READ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 778 F. 2d 1437.

No. 85-6976. PENDLETON *v.* NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 6.

No. 85-6980. HART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 933.

No. 85-6981. GOLDSBY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-6987. BLAIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 785 F. 2d 306.

No. 85-6988. BOSHEARS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6990. MALQUIST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 85–6991. THOMPSON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85–6993. PENNINGTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–6994. MINICK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 506 A. 2d 1115.

No. 85–6997. YINGLING *v.* BOYCE ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85–6998. TORAIN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 316 N. C. 111, 340 S. E. 2d 465.

No. 85–7000. DAVIDSON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 785 F. 2d 1033.

No. 85–7001. FROST *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 502 A. 2d 462.

No. 85–7002. DAWSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1016.

No. 85–7003. KOENIG *v.* HURON REGIONAL CORRECTIONAL CENTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1049.

No. 85–7004. SNYDER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 787 F. 2d 1429.

No. 85–7005. CROWELL *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 1560.

No. 85–7007. FINNAN *v.* FINNAN ET AL. C. A. 2d Cir. Certiorari denied.

No. 85–7009. GUTIERREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 402.

No. 85–7011. MCCUTCHEON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 111 Ill. 2d 487, 490 N. E. 2d 662.

No. 85–7012. ROBERTS *v.* MACKEY ET AL. C. A. 1st Cir. Certiorari denied.

No. 85–7014. MEADOWS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 489.

No. 85–7015. REEVES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 1323.

No. 85–7018. HAINES *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 238 Kan. 478, 712 P. 2d 1211.

No. 85–7021. BRECKENRIDGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 1317.

No. 85–7022. BRAGG *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1112.

No. 85–7023. CHAVEZ *v.* SULLIVAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–7024. DENSON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 139 Ill. App. 3d 914, 487 N. E. 2d 777.

No. 85–7025. HOLLINS *v.* HENKEL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 486 So. 2d 605.

No. 85–7028. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 787 F. 2d 929.

No. 85–7029. LINTHICUM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 1568.

No. 85–7030. ROGERS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 403.

No. 85–7033. VIOLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 85–7034. JERMOSEN *v.* COUGHLIN, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONS, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85–7035. TRAUNIG *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 325.

No. 85–7036. PIRROTTA *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 21 Mass. App. 456, 488 N. E. 2d 780.

No. 85–7037. TURNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 85–7038. LEWIS *v.* LEHMAN, SECRETARY OF THE NAVY (two cases). C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 648 (first case).

No. 85–7039. GAYLE *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 802.

No. 85–7040. JOHNS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 789 F. 2d 919.

No. 85–7041. BONAPARTE *v.* HAHN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1145.

No. 85–7042. EITEL *v.* BALDWIN. Sup. Ct. Alaska. Certiorari denied.

No. 85–7043. HARRIS *v.* J. G. W. ASSOCIATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1028.

No. 85–7044. GARAUX *v.* VASQUEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 9.

No. 85–7045. MUMFORD *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 305 Md. 621, 505 A. 2d 1342.

No. 85–7047. COLBERT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 714 P. 2d 209.

No. 85–7048. BRYNER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 85–7049. PROVENS *v.* NEY. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 934.

No. 85–7051. CAPPS *v.* N. L. BAROID-NL INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 615.

No. 85–7053. MAZZONE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 782 F. 2d 757.

No. 85–7054. HOLT *v.* CONTINENTAL GROUP, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 3.

No. 85–7056. COLLEY *v.* SUMNER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 984.

No. 85–7057. ROBERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 779 F. 2d 565.

No. 85–7058. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1461.

No. 85–7059. MURPHREE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 783 F. 2d 605.

No. 85–7061. ROBERTS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 66 Md. App. 814.

No. 85–7062. POLES *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1148.

No. 85–7064. COMSIA *v.* BURKHART ET UX. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 85–7065. JACKSON *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES. Ct. App. D. C. Certiorari denied.

No. 85–7066. WILSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 750 F. 2d 7.

No. 85–7067. ALLEN *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 85–7069. DAVIS *v.* WADE ET AL. C. A. 5th Cir. Certiorari denied.

No. 85–7072. CHINN *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1173.

No. 85–7073. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1054.

No. 85–7074. O'DELL *v.* SMITH ET AL. C. A. 8th Cir. Certiorari denied.

No. 85–7075. PERKINS *v.* ELLIS, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85–7076. CARDALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85–7081. ROCQUE *v.* LEE. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 8.

No. 85–7082. NICHOLS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 1540.

No. 85–7083. ARMSTRONG *v.* SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY (ARMSTRONG, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85–7084. OWENS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 486 So. 2d 748.

No. 85–7085. DUCKETT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–7086. LAWRENCE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1017.

No. 85–7090. FILIPAS *v.* AKRON GENERAL HOSPITAL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 307.

No. 85–7091. LOPEZ *v.* KINCHELOE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1053.

No. 85–7092. ROCHON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 787 F. 2d 586.

No. 85–7093. NOVAK *v.* ILLINOIS DEPARTMENT OF CORRECTIONS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 789 F. 2d 919.

No. 85–7095. SHABAZZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 175 Cal. App. 3d 468, 221 Cal. Rptr. 15.

No. 85–7096. RANSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 707 S. W. 2d 96.

No. 85–7097. STOCKTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 210.

No. 85–7099. VORTIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 251 U. S. App. D. C. 329, 785 F. 2d 327.

No. 85–7101. OSIPOVA *v.* HOME ENERGY ASSISTANCE PROGRAM, CITY OF NEW YORK DEPARTMENT FOR AGING, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85–7102. ANGLIAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 784 F. 2d 765.

No. 85–7103. COQUILLIAN *v.* JONES, SUPERINTENDENT, STONE MOUNTAIN CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied.

No. 85–7104. MCCROSSEN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 129 Wis. 2d 277, 385 N. W. 2d 161.

No. 85–7105. WIGGINS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 346 Pa. Super. 238, 499 A. 2d 585.

No. 85–7106. WALK *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 384 N. W. 2d 1.

No. 85–7108. RADVAN-ZIEMNOWICZ *v.* COMMISSION ON MEDICAL DISCIPLINE OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 305 Md. 106, 501 A. 2d 845.

No. 85–7109. SIMMONS *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1016.

No. 85–7110. CORDLE *v.* HOLCOMB ET AL. Sup. Ct. Ky. Certiorari denied.

No. 85–7112. WASHINGTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 923.

No. 85–7113. SNYDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 790 F. 2d 87.

No. 85–7114. RIPP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 761.

No. 85–7115. VESAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 85–7116. STAWICKI *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 778 F. 2d 380.

No. 85–7118. TRIPATI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85–7119. RANKEL *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 85–7120. PELAES *v.* UNITED STATES; and
No. 86–59. OSORNO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 790 F. 2d 254.

No. 85–7121. DAVIS *v.* COOMBE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 136.

No. 85–7123. BROWN *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 787 F. 2d 595.

No. 85–7126. TUCKER *v.* WILLIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–7127. THACKER *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85–7130. VALERIANO *v.* LOPES, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTIONS. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 137.

No. 85–7131. BREEST *v.* CUNNINGHAM, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 784 F. 2d 435.

No. 85–7132. LOGGINS *v.* FREY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 364.

No. 85–7133. JONES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85–7134. BARKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85–7135. COLLIER *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied.

No. 85–7136. KIMBLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 1160.

No. 85–7137. CUVREAU ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1176.

No. 85–7138. ABNEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–7139. PETERSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 777 F. 2d 482.

No. 85–7140. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1178.

No. 85–7143. SHAW *v.* JOHNSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 786 F. 2d 993.

No. 85–7144. THOMPSON *v.* OWEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1112.

No. 85–7145. MORKE *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1155.

No. 85–7146. YOUNGS-SETTLE *v.* ANDERSON. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1061.

No. 85–7147. RODERICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 923.

No. 85–7148. MCKOY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 252 U. S. App. D. C. 19, 786 F. 2d 432.

No. 85–7149. LANE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 935.

No. 85–7151. HARTMAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 486 So. 2d 748.

No. 85–7153. FRIEL *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 508 A. 2d 123.

No. 85–7155. KOENIG *v.* JONES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1170.

No. 85-7157. GRIMES *v.* DEPARTMENT OF THE ARMY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 590.

No. 85-7158. HATTON *v.* SCROGGY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 933.

No. 85-7159. GRACE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 250 U. S. App. D. C. 197, 778 F. 2d 818.

No. 85-7160. JONES *v.* JOHNSON, SUPERINTENDENT, MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 590.

No. 85-7164. KNAPP *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 113 App. Div. 2d 154, 495 N. Y. S. 2d 985.

No. 85-7166. CAMERON *v.* PENNINGTON COUNTY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1168.

No. 85-7167. DAMIANI *v.* TOMASKY ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-7168. FRAZIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1461.

No. 85-7170. WALKER *v.* GROVES ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-7172. SKINNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 1035.

No. 85-7173. PROVENS *v.* MARSHALL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1166.

No. 85-7174. SAMPSON *v.* LOVE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 53.

No. 85-7175. POULOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-7176. HAYNES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 939.

No. 85–7177. BOOKER *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 792 F. 2d 142.

No. 85–7178. JENKINS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 506 A. 2d 1120.

No. 85–7180. GRANDISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 783 F. 2d 1152.

No. 85–7181. LEE *v.* HARDAGE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1035.

No. 85–7185. CRUZ *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 9.

No. 85–7186. KIBBE *v.* CITY OF PORT HURON. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 590.

No. 85–7187. DELLOSSO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 882, 492 N. E. 2d 1240.

No. 85–7192. GOODRICH *v.* BANK OF AMERICA ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–7193. BERIK *v.* UNITED STATES; and
No. 85–7218. BAKAK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 789 F. 2d 917.

No. 85–7194. HOWARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 933.

No. 85–7196. WROBLEWSKI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 933, 493 N. E. 2d 943.

No. 85–7197. WILLIAMSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 923.

No. 85–7199. WALKER *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 80.

No. 85–7200. SMITH *v.* HAMBY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 593.

No. 85–7201. ZARAGOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 761.

No. 85–7202. MEST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 789 F. 2d 1069.

No. 85–7205. HERRON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 584.

No. 85–7207. FRONTELA *v.* UNITED STATES; and
No. 86–5128. DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 170.

No. 85–7208. CONKLIN *v.* TARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–7209. BREAZEALE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 238 Kan. 714, 714 P. 2d 1356.

No. 85–7210. ALLEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 789 F. 2d 90.

No. 85–7211. BROWN *v.* NORWOOD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1151.

No. 85–7212. GOINS *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 787 F. 2d 248.

No. 85–7213. CULBRETH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 791 F. 2d 926.

No. 85–7214. HAMILTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 1567.

No. 85–7219. LAMPORT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 787 F. 2d 474.

No. 85–7220. DARE *v.* SECRETARY OF THE AIR FORCE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 581.

No. 85–7222. COLLIER *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–7223. MCWILSON *v.* FOLTZ, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 1292.

No. 85–7224. PICCIANDRA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 788 F. 2d 39.

No. 85–7226. WEINBERGER *v.* RISLEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 787 F. 2d 598.

No. 85–7227. LOWE *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 85–7228. BRADBURN *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 627.

No. 85–7229. KOSTER *v.* UNION CARBIDE CORP. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 1004.

No. 85–7231. REIGH ET AL. *v.* SCHLEIGH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 784 F. 2d 1191.

No. 85–7233. JONES *v.* NEWCOMER. C. A. 3d Cir. Certiorari denied.

No. 85–7234. HALL *v.* WHITE, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 403.

No. 85–7235. FLUKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 593.

No. 85–7237. ODONER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 791 F. 2d 1270.

No. 85–7238. ABRAHAM *v.* MYERS. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 4.

No. 85–7239. BROWN *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 86–1. SUBURBAN O'HARE COMMISSION ET AL. *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. (two cases). C. A. 7th Cir. Certiorari denied. Reported below: 787 F. 2d 186 (first case).

No. 86–4. CANTU ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 2d 1305.

No. 86–5. ALLUSTIARTE ET AL. *v.* COOPER, TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 910.

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No. 86–10. UNITED TRANSPORTATION UNION ET AL. *v.* MAINE CENTRAL RAILROAD CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 787 F. 2d 780.

No. 86–12. ESPOSITO ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 7.

No. 86–13. O'MALEY ET UX. *v.* COUNTY OF BACA ET AL. C. A. 10th Cir. Certiorari denied.

No. 86–15. DEVINE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 787 F. 2d 1086.

No. 86–16. EASTERLING *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 710 S. W. 2d 569.

No. 86–17. CITY OF CORONA ET AL. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE ET AL. Sup. Ct. Cal. Certiorari denied.

No. 86–18. STANG *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (UNITED STATES, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 86–19. BIERMANN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 1569.

No. 86–20. ACME REFRIGERATION OF BATON ROUGE, INC. *v.* WHIRLPOOL CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 785 F. 2d 1240.

No. 86–26. UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSN. (BERMUDA) LTD. *v.* STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 1035.

No. 86–27. BENSON *v.* ALLPHIN ET AL.; and
No. 86–29. ALLPHIN ET AL. *v.* BENSON. C. A. 7th Cir. Certiorari denied. Reported below: 786 F. 2d 268.

No. 86–30. MANN ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1179.

No. 86–31. TATE *v.* OVERSEAS BULKTANK CORP. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 1160.

No. 86-32. WIDMER *v.* WIDMER, EXECUTOR OF THE ESTATE OF WIDMER. Ct. App. Ark. Certiorari denied. Reported below: 17 Ark. App. xxi.

No. 86-33. CSX CORP. *v.* OGLEBAY NORTON CO. C. A. 6th Cir. Certiorari denied. Reported below: 788 F. 2d 361.

No. 86-34. GANCI ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1164.

No. 86-36. SISEMORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 310.

No. 86-37. HECHENBERGER *v.* WESTERN ELECTRIC CO., INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 347.

No. 86-43. DROTT MANUFACTURING CORP. *v.* DAVIDSON ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 315.

No. 86-46. WEIL *v.* MCCLOUGH ET AL. C. A. 2d Cir. Certiorari denied.

No. 86-52. KUNGLE *v.* ST. JOHN'S COLLEGE ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 65 Md. App. 776.

No. 86-53. AMODEO ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 788 F. 2d 1549.

No. 86-54. AL-KHAFAJI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 593.

No. 86-60. POOLER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 868.

No. 86-62. PREVATTE *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 934.

No. 86-63. B. P. NORTH AMERICA PETROLEUM, INC. *v.* WAY WISER NAVIGATION CORP. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 975.

No. 86-64. MARVIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 679.

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No. 86-65. McDONALD *v.* EGGER, COMMISSIONER OF THE DEPARTMENT OF INTERNAL REVENUE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1174.

No. 86-66. KREEGER FARMS HOME DAIRY, INC., ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE. C. A. D. C. Cir. Certiorari denied. Reported below: 252 U. S. App. D. C. 136, 788 F. 2d 38.

No. 86-68. HAWKINS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 200.

No. 86-70. SAMMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 86-73. BOOKER *v.* MOBLEY. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 307.

No. 86-77. NORDGREN *v.* HAFTER, CHAIRMAN, MISSISSIPPI BOARD OF BAR ADMISSIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 789 F. 2d 334.

No. 86-79. PINE STREET BAPTIST CHURCH ET AL. *v.* SECURITIES INVESTOR PROTECTION CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 788 F. 2d 1208.

No. 86-81. LOCKETT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 489 So. 2d 653.

No. 86-82. RECKMEYER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1216.

No. 86-83. HANSEN *v.* PRENTICE-HALL, INC. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 892.

No. 86-89. MILLER *v.* MILLER. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 176 Cal. App. 3d 1183, 222 Cal. Rptr. 652.

No. 86-92. ALLEN *v.* ALLEN. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 484 So. 2d 269.

No. 86-95. RUNYAN *v.* NCR CORP. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 1039.

No. 86-96. EASTMAN KODAK CO. *v.* POLAROID CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 789 F. 2d 1556.

No. 86–99. HARDIE *v.* HARDIE. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 315.

No. 86–101. HARRIS ET AL. *v.* COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 787 F. 2d 427.

No. 86–110. VRETTA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 790 F. 2d 651.

No. 86–112. MAURIELLO *v.* UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 919.

No. 86–115. O'BRIEN *v.* SHC CORP. ET AL. C. A. 4th Cir. Certiorari denied.

No. 86–116. RICKARDS ET AL. *v.* CANINE EYE REGISTRATION FOUNDATION, INC. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1329.

No. 86–118. KHUBANI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 791 F. 2d 260.

No. 86–119. SCHEINBLUM *v.* SULLIVAN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 86–125. ANDERSON *v.* UNITED STATES DEPARTMENT OF AGRICULTURE. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 93.

No. 86–126. BORSCH *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 170.

No. 86–128. FLORENCE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1052.

No. 86–131. THORNTON *v.* WAHL, SHERIFF, LASALLE COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 787 F. 2d 1151.

No. 86–132. NEUMANN ET AL. *v.* REINFORCED EARTH CO. C. A. D. C. Cir. Certiorari denied. Reported below: 252 U. S. App. D. C. 11, 786 F. 2d 424.

No. 86–135. JARVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 767.

No. 86–138. NATIONAL COMMUNICATION SYSTEMS, INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 789 F. 2d 370.

No. 86–140. CELOTEX CORP. ET AL. *v.* SCHOOL DISTRICT OF LANCASTER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 789 F. 2d 996.

No. 86–141. PETROZZIELLO *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 22 Mass. App. 71, 491 N. E. 2d 627.

No. 86–145. DURA CORP. ET AL. *v.* TWM MANUFACTURING CO., INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 789 F. 2d 895.

No. 86–146. IRVIN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 342.

No. 86–147. HOME WARRANTY CORP. ET AL. *v.* CALDWELL, INSURANCE COMMISSIONER OF THE STATE OF GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 1455.

No. 86–155. RIGGS *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 7 Conn. App. 180, 508 A. 2d 67.

No. 86–156. LOWE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 787 F. 2d 1501.

No. 86–157. BAKER, SECRETARY OF THE TREASURY, ET AL. *v.* ABORTION RIGHTS MOBILIZATION, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 3.

No. 86–159. GRAVER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1146.

No. 86–161. BLACK CLOUD BUILDING CORP. *v.* HARMAN, DIRECTOR, MARICOPA COUNTY DEPARTMENT OF HEALTH SERVICES, ET AL. Ct. App. Ariz. Certiorari denied.

No. 86–164. CRABTREE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1178.

No. 86–165. BROOKS ET AL. *v.* CHRYSLER CORP. C. A. D. C. Cir. Certiorari denied. Reported below: 252 U. S. App. D. C. 29, 786 F. 2d 1191.

No. 86–169. DES VIGNES *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 791 F. 2d 142.

No. 86–171. DOTY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 345 Pa. Super. 374, 498 A. 2d 870.

No. 86–174. MAHAN & ROWSEY, INC. *v.* OKLAHOMA NATURAL GAS. C. A. 10th Cir. Certiorari denied. Reported below: 786 F. 2d 1004.

No. 86–176. KAKAVAS *v.* FLOTA OCEANICA BRASILEIRA, S. A. C. A. 2d Cir. Certiorari denied. Reported below: 789 F. 2d 112.

No. 86–178. FORMA *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 92.

No. 86–183. ABALKHAIL *v.* CLAREMONT UNIVERSITY CENTER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–184. E. I. DU PONT DE NEMOURS & CO. *v.* GRASSELLI EMPLOYEES INDEPENDENT ASSOCIATION OF EAST CHICAGO, INC. C. A. 7th Cir. Certiorari denied. Reported below: 790 F. 2d 611.

No. 86–185. HEGHMANN *v.* CONNECTICUT. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 5.

No. 86–188. SIMMONS ET AL. *v.* COMBS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 970.

No. 86–191. THOMAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 788 F. 2d 1250.

No. 86–192. TATE *v.* FISCHER STEEL CORP. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 935.

No. 86–193. WRONKE *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 787 F. 2d 1569.

No. 86–194. MALACHOWSKI ET UX., ON BEHALF OF THE JUVENILE, AMY M. *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied.

No. 86–197. SORENSEN ET AL. *v.* CAREY ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 966.

No. 86–198. HAFFER *v.* ACTION MANUFACTURING, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 790 F. 2d 164.

No. 86–199. HELMICK *v.* LAUNDERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 790 F. 2d 85.

No. 86–200. COHEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 796 F. 2d 20.

No. 86–204. ADVANCE BUILDING MAINTENANCE CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 94.

No. 86–206. MARTIN ET AL. *v.* ROBINSON, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 1377.

No. 86–207. MARK C. BLOOME CO. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (SHEPHERD ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–214. KESTER ET AL. *v.* HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 778 F. 2d 1565.

No. 86–235. BELL *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 86–240. MAY *v.* TRANSWORLD DRILLING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 1261.

No. 86–242. SMITH *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 324.

No. 86–244. VAN HORN ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 789 F. 2d 1492.

No. 86–248. JACKSON *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1016.

No. 86–258. WINSLOW MANUFACTURING, INC., ET AL. *v.* KAIN, DBA BROCK-KAIN. C. A. 10th Cir. Certiorari denied.

No. 86–266. LOUISIANA SCHOOL OF PROFESSIONS, INC. *v.* BENNETT, SECRETARY OF EDUCATION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 791 F. 2d 929.

No. 86–290. KONSTANTINOV *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 1296.

No. 86–293. REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 792 F. 2d 536.

No. 86–316. HARVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 789 F. 2d 1492.

No. 86–320. PROCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 1387.

No. 86–323. LUMUMBA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 806.

No. 86–325. WATLINGTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 253 U. S. App. D. C. 393, 793 F. 2d 1379.

No. 86–331. AMPLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 1005.

No. 86–350. MARTINDALE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 790 F. 2d 1129.

No. 86–363. FREEDMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 1093.

No. 86–366. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 638.

No. 86–5002. BUCHANAN *v.* ATTORNEY GENERAL OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 931.

No. 86–5003. GAMBRELL *v.* ACKERMAN, JUDGE. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1133.

No. 86–5004. KING *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 251 U. S. App. D. C. 192, 782 F. 2d 274.

No. 86–5005. BOGLE *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 931.

No. 86–5006. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–5008. MCCALL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 487 So. 2d 1375.

No. 86–5010. ROJAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 783 F. 2d 105.

No. 86–5011. COKELEY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 288 Ark. 349, 705 S. W. 2d 425.

No. 86–5012. WOLFE *v.* HUNTERDON COUNTY NATIONAL BANK OF FLEMINGTON. Sup. Ct. Pa. Certiorari denied. Reported below: 510 Pa. 285, 507 A. 2d 812.

No. 86–5014. DERUGGIERO *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 86–5015. GREEN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 86–5016. KRAHN *v.* MCGILL ET AL. C. A. 5th Cir. Certiorari denied.

No. 86–5018. ALLEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 1395.

No. 86–5019. DELAND *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 70.

No. 86–5022. ELLIS *v.* UNITED STATES PAROLE COMMISSION. C. A. 3d Cir. Certiorari denied.

No. 86–5023. HOOKS *v.* GRAHAM, GOVERNOR OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1177.

No. 86-5027. SILVESTRI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 790 F. 2d 186.

No. 86-5028. PHENSOOT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 318.

No. 86-5030. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 787 F. 2d 375.

No. 86-5031. STONER *v.* REES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 935.

No. 86-5034. CABAL *v.* METROMEDIA, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 86-5035. HAYNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 789 F. 2d 917.

No. 86-5036. HAWKINS *v.* ALLSBROOK, SUPERINTENDENT, ODOM CORRECTIONAL COMPLEX, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1153.

No. 86-5037. CROWELL *v.* WARDEN, VIRGINIA STATE PENITENTIARY. Sup. Ct. Va. Certiorari denied.

No. 86-5038. REID *v.* WASHTENAW CIRCUIT COURT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 934.

No. 86-5040. WILLOUGHBY *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 507 A. 2d 1060.

No. 86-5041. VALWAY ET UX. *v.* KEARNS ET AL. C. A. 1st Cir. Certiorari denied.

No. 86-5043. RICCIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1178.

No. 86-5044. WILLIAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1180.

No. 86-5045. SMITH *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 1288.

No. 86-5046. FARKAS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 458.

No. 86–5048. COLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86–5049. EISENBERG *v.* SMITH ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 787 F. 2d 578.

No. 86–5050. LANDRUM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 935.

No. 86–5051. PHELPS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 789 F. 2d 917.

No. 86–5052. WILKINS *v.* KANE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 792 F. 2d 140.

No. 86–5053. PENA-PEREZ *v.* LOUISIANA STATE BAR ASSN. Sup. Ct. La. Certiorari denied. Reported below: 489 So. 2d 240.

No. 86–5055. ECK *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 86–5056. JOHL *v.* JOHL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 75.

No. 86–5057. DELEON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 86–5058. BINDER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 717 P. 2d 1143.

No. 86–5059. MALLOY *v.* GWALTNEY. C. A. 11th Cir. Certiorari denied.

No. 86–5060. JENNINGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 917.

No. 86–5062. BENNETT *v.* CHARLES ET AL. C. A. 1st Cir. Certiorari denied.

No. 86–5063. CLAUSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 792 F. 2d 102.

No. 86–5064. CHEEVES *v.* MONTGOMERY. C. A. 11th Cir. Certiorari denied.

No. 86–5065. GIBBS *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 86–5066. ANDERSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 118 App. Div. 2d 788, 500 N. Y. S. 2d 296.

No. 86–5067. CUEVAS-MORALES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 787 F. 2d 579.

No. 86–5069. FORD *v.* SALTZMAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1048.

No. 86–5070. BIRDEN *v.* ORLANDO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 4.

No. 86–5071. WHITE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 86–5072. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1167.

No. 86–5074. CREEL *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86–5078. STREETER *v.* JEFFERSON COUNTY, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 940.

No. 86–5079. MCINTYRE *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1013.

No. 86–5080. SCHATZ *v.* RISLEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 790 F. 2d 85.

No. 86–5083. WRIGHT *v.* YACKLEY. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 679.

No. 86–5084. BARBER *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 397 Mass. 1101, 490 N. E. 2d 803.

No. 86–5085. OLIVER *v.* DUGGER, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 949.

No. 86–5086. PETRIC *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 66 Md. App. 470, 504 A. 2d 1168.

No. 86–5087. MILLER *v.* BOLGER, POSTMASTER GENERAL OF THE UNITED STATES, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 785 F. 2d 1033.

No. 86–5088. MILLER *v.* WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86–5089. WRIGHT *v.* FIRESTONE TIRE & RUBBER CO. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 939.

No. 86–5091. KNOX *v.* NATIONAL BANK OF COMMERCE OF KERRVILLE. Sup. Ct. Tex. Certiorari denied.

No. 86–5092. HERNANDEZ *v.* TEXAS. Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 692 S. W. 2d 190.

No. 86–5093. TSCHETTER ET UX. *v.* MITCHELL-HURON PRODUCTION CREDIT ASSN. Sup. Ct. S. D. Certiorari denied. Reported below: 384 N. W. 2d 323.

No. 86–5097. JENSON *v.* MCDOUGALD. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1465.

No. 86–5099. ALI *v.* BUFFALO FORD STAMPING DIVISION OF THE FORD MOTOR CO. ET AL. C. A. 2d Cir. Certiorari denied.

No. 86–5101. TATE *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1175.

No. 86–5102. SMITH *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied. Reported below: 30 Ohio App. 3d 138, 506 N. E. 2d 1205.

No. 86–5103. WARNER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 86–5104. MITCHELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 783 F. 2d 971.

No. 86–5105. NOLL *v.* PETROVSKY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 86–5106. OSLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 938.

No. 86–5107. WILLIAMS *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 1294.

No. 86–5110. RICHMOND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 771.

No. 86–5111. LINNE *v.* UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 252 U. S. App. D. C. 136, 788 F. 2d 38.

No. 86–5112. FRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 787 F. 2d 903.

No. 86–5113. CHERRY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 491 So. 2d 1003.

No. 86–5115. DOFFIN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 791 F. 2d 118.

No. 86–5116. JAMES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 86–5117. LANGLEY *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 110 Idaho 895, 719 P. 2d 1155.

No. 86–5119. GLASGOW *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 86–5122. WEST, AKA HELLERMAN *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 86–5123. CARSON *v.* MARTIN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 939.

No. 86–5125. ROBINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86–5126. SHRADER ET AL. *v.* NEVADA ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 102 Nev. 749.

No. 86–5129. LYUBARSKY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 790 F. 2d 1015.

No. 86-5132. HAMPTON *v.* K MART CORP. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 1161.

No. 86-5133. HENAGER *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 86-5136. MISSIRLIAN *v.* HUNTINGTON MEMORIAL HOSPITAL. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1174.

No. 86-5138. VIOLA *v.* KUBITZA ET AL. C. A. 9th Cir. Certiorari denied.

No. 86-5140. MOBLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 86-5141. RODRIGUEZ *v.* TEXAS. Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied.

No. 86-5142. RAINES *v.* BOUTWELL, ACTING WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 939.

No. 86-5144. MILLER *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1018.

No. 86-5145. THOMAS *v.* DEUKMEJIAN, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1054.

No. 86-5146. MANN *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 323.

No. 86-5148. VESTER *v.* WILSON COUNTY SUPERIOR COURT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 790 F. 2d 889.

No. 86-5149. MIHAL ET AL. *v.* SARGIS ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 86-5150. DURHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 932.

No. 86-5151. MCLAMB *v.* THIGPEN ET AL. C. A. 5th Cir. Certiorari denied.

No. 86-5152. SYKES *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 475.

No. 86-5153. INGLE *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 178 Cal. App. 3d 505, 223 Cal. Rptr. 723.

No. 86-5155. WOLLSCHLAGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 782 F. 2d 1045.

No. 86-5156. MAY *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 934.

No. 86-5157. HARVARD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 486 So. 2d 537.

No. 86-5160. FEWELL *v.* FEWELL. Sup. Ct. S. C. Certiorari denied.

No. 86-5161. BRUMBAUGH *v.* BRUMBAUGH. Sup. Ct. Fla. Certiorari denied. Reported below: 491 So. 2d 278.

No. 86-5162. CLARK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86-5163. ANSARI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86-5164. HAYNES *v.* VERDEYEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 790 F. 2d 888.

No. 86-5165. SPIOTTO *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 792 F. 2d 143.

No. 86-5166. LIRA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86-5167. PEREA *v.* WINANS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 86-5168. STIVALE *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1017.

No. 86-5169. TOLIVER *v.* COMMUNITY ACTION COMMISSION TO HELP THE ECONOMY, INC. (CACHE). C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 1128.

No. 86–5170. DIAZ *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 139 Ill. App. 3d 1163, 503 N. E. 2d 610.

No. 86–5171. BALES *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 86–5172. PERRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 788 F. 2d 100.

No. 86–5174. SKAGGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 86–5175. PETERSON *v.* DEPARTMENT OF PUBLIC WELFARE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 920.

No. 86–5176. OMAR, AKA SNEED *v.* SIMPSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1112.

No. 86–5177. WELLS *v.* CITY OF HOUSTON, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 1563.

No. 86–5178. MALLOY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 86–5179. OLIVA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 86–5180. DUKE *v.* DUKE. Sup. Ct. R. I. Certiorari denied. Reported below: 510 A. 2d 430.

No. 86–5185. AVEDISIAN *v.* HUBBARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 790 F. 2d 888.

No. 86–5186. VILT *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 139 Ill. App. 3d 868, 488 N. E. 2d 580.

No. 86–5189. BUMGARNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 679.

No. 86–5190. SAUNDERS *v.* CHAPA ET AL. C. A. 5th Cir. Certiorari denied.

No. 86–5191. SIMMONS *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied.

No. 86-5194. FOSTER *v.* BLACK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 678.

No. 86-5195. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 792 F. 2d 531.

No. 86-5196. CALKINS *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 1290.

No. 86-5197. CABRERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 1005.

No. 86-5199. TURNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 36.

No. 86-5200. MABERY *v.* HOLLOWAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 791 F. 2d 926.

No. 86-5203. COMICZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 1005.

No. 86-5204. FARMER *v.* DILLION. C. A. 6th Cir. Certiorari denied. Reported below: 795 F. 2d 85.

No. 86-5205. JOHNSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 709 S. W. 2d 838.

No. 86-5208. COATS *v.* ARMSTRONG. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 86-5212. BECKER *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 6.

No. 86-5213. GAHAN *v.* AMERICAN RED CROSS ET AL. Sup. Ct. Va. Certiorari denied.

No. 86-5214. ENRIQUEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 787 F. 2d 375.

No. 86-5215. KANUSE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 86-5216. ADOLPH *v.* LEHMAN BROTHERS KUHN LOEB, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 314.

No. 86-5219. WOODS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 112 Ill. 2d 568.

No. 86-5220. MASLANKA *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 42 Wash. App. 1053.

No. 86-5221. MONTGOMERY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 141 Ill. App. 3d 428, 490 N. E. 2d 206.

No. 86-5222. SARGENT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 139 Ill. App. 3d 488, 487 N. E. 2d 1002.

No. 86-5223. TALLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 790 F. 2d 1468.

No. 86-5225. DAVIS *v.* CHILDREN'S HOSPITAL OF NORTHERN CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 86-5227. RIVERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 795 F. 2d 88.

No. 86-5228. RANDOLPH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 139 Ill. App. 3d 1162, 503 N. E. 2d 609.

No. 86-5231. LANING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 593.

No. 86-5232. GEORGE *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 1099.

No. 86-5233. DUVALLON *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 86-5237. CRIM *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied.

No. 86-5238. COMBS *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 937.

No. 86-5239. ALBRITTON *v.* C. H. MASLAND & SONS. C. A. 11th Cir. Certiorari denied. Reported below: 790 F. 2d 88.

No. 86-5240. SHOWS *v.* ALABAMA POWER CO. C. A. 11th Cir. Certiorari denied.

No. 86-5244. SHIFFLETT *v.* SULLIVAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 86-5246. JANKOWSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1141.

No. 86-5247. BURTON *v.* SCROGGY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 1290.

No. 86-5248. DACE *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied.

No. 86-5249. BECKER *v.* RECORD WORLD. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 4.

No. 86-5250. GARCIA *v.* MONDRAGON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 86-5251. BARNES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86-5252. JONES *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 482 So. 2d 1100.

No. 86-5253. KNAUBERT *v.* GOLDSMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 722.

No. 86-5254. HARMON *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 77 Ore. App. 705, 714 P. 2d 271.

No. 86-5258. ISHIHARA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1123.

No. 86-5259. COLEMAN *v.* PERDUE, INC. C. A. 3d Cir. Certiorari denied.

No. 86-5260. MOSIMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1167.

No. 86-5262. RICHARDSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 787 F. 2d 586.

No. 86-5263. VIRGIL *v.* COLE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 789 F. 2d 918.

No. 86-5264. SHOWS *v.* CARROLL. C. A. 11th Cir. Certiorari denied.

No. 86-5265. GUILLEN-SILVA *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied.

No. 86-5270. CREWE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 86-5278. SAMM *v.* PLAZA WEST COOPERATIVE ASSN., INC. Ct. App. D. C. Certiorari denied.

No. 86-5279. WILDER *v.* CITY OF RICHMOND, VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 8.

No. 86-5286. FISHER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1032.

No. 86-5288. STATON *v.* LUKHARD, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 973.

No. 86-5293. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 790 F. 2d 1215.

No. 86-5313. SAIKALI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 1129.

No. 86-5315. BURNS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 1294.

No. 86-5322. BERRY *v.* BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1270.

No. 86-5325. BENAVIDES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 612.

No. 86-5331. LEHMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 899.

No. 86-5332. SPEAR *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 86-5335. BARKSDALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 790 F. 2d 891.

No. 86–5336. SEARS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 1383.

No. 86–5339. ENGESSER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 1401.

No. 86–5342. FERRI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1140.

No. 86–5343. PRICE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 1305.

No. 86–5349. CELANI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 794 F. 2d 1195.

No. 86–5353. HUGHES *v.* BOWEN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 939.

No. 86–5360. RIVERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 795 F. 2d 88.

No. 86–5366. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 795 F. 2d 88.

No. 86–5372. MIKELS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 1462.

No. 86–5382. SIMMONS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 475.

No. 85–1694. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* HORACE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 781 F. 2d 1558.

No. 85–1895. CHILDRESS *v.* THOMAS S. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 781 F. 2d 367.

No. 85–1928. DELAWARE *v.* WAINWRIGHT. Sup. Ct. Del. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 504 A. 2d 1096.

No. 85–1978. FLORIDA *v.* TORRES. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 485 So. 2d 469.

No. 85–1982. RIVELAND, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS *v.* BALL. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 779 F. 2d 578.

No. 85–2065. FLORIDA *v.* PINA. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 473 So. 2d 736.

No. 86–123. ILLINOIS *v.* STACK. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 112 Ill. 2d 301, 493 N. E. 2d 339.

No. 86–196. SCULLY, WARDEN, ET AL. *v.* HOLLAND. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 797 F. 2d 57.

No. 85–1844. F. D. *v.* ASSOCIATED CATHOLIC CHARITIES OF NEW ORLEANS, INC., ET AL. Ct. App. La., 4th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 480 So. 2d 380.

No. 85–1862. GRAALMAN *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 790 F. 2d 92.

No. 85–1884. HUNT INTERNATIONAL RESOURCES CORP. ET AL. *v.* W. C. & KENNETH STREY. C. A. 10th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.* Reported below: 749 F. 2d 1437.

No. 85–1972. RONWIN *v.* HOLOHAN ET AL., JUDGES, SUPREME COURT OF ARIZONA. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.* Reported below: 782 F. 2d 1053.

No. 85–2014. MCDOUGALL *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Mecklenburg County, N. C.;
No. 85–2027. MILLIGAN *v.* NEVADA. Sup. Ct. Nev.;
No. 85–6424. ANDERSON *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85–6755. FETTERLY *v.* IDAHO. Sup. Ct. Idaho;

*See also note, p. 801.

No. 85-6831. McKAY *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85-6868. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85-6890. BUELL *v.* OHIO. Sup. Ct. Ohio;
No. 85-6933. RILEY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 85-6950. GREEN *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 85-6958. ECHOLS *v.* FLORIDA. Sup. Ct. Fla.;
No. 85-6970. GLADDEN *v.* NORTH CAROLINA. Sup. Ct. N. C.;
No. 85-7017. COOK *v.* GEORGIA. Sup. Ct. Ga.;
No. 85-7026. LANDRY *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85-7050. BECK *v.* GEORGIA. Sup. Ct. Ga.;
No. 85-7063. CRUMP *v.* NEVADA. Sup. Ct. Nev.;
No. 85-7070. BYRNE *v.* LOUISIANA. Sup. Ct. La.;
No. 85-7088. ZEITVOGEL *v.* MISSOURI. Sup. Ct. Mo.;
No. 85-7089. DAVIS *v.* GEORGIA. Sup. Ct. Ga.;
No. 85-7141. WARD *v.* LOUISIANA. Sup. Ct. La.;
No. 85-7236. O'GUINN *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 86-106. KELLEY *v.* FLORIDA. Sup. Ct. Fla.;
No. 86-5007. BREWER *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 86-5109. MATTHEWS *v.* KENTUCKY. Sup. Ct. Ky.;
No. 86-5127. DAVIS *v.* GEORGIA. Sup. Ct. Ga.;
No. 86-5206. FREE *v.* ILLINOIS. Sup. Ct. Ill.;
No. 86-5280. LAWS *v.* MISSOURI. Sup. Ct. Mo.; and
No. 86-5300. GALLEGO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: No. 85-2027, 101 Nev. 627, 708 P. 2d 289; No. 85-6424, 701 S. W. 2d 868; No. 85-6755, 109 Idaho 766, 710 P. 2d 1202; No. 85-6831, 707 S. W. 2d 23; No. 85-6868, 698 S. W. 2d 154; No. 85-6890, 22 Ohio St. 3d 124, 489 N. E. 2d 795; No. 85-6933, 778 F. 2d 1544; No. 85-6950, 713 P. 2d 1032; No. 85-6958, 484 So. 2d 568; No. 85-6970, 315 N. C. 398, 340 S. E. 2d 673; No. 85-7017, 255 Ga. 565, 340 S. E. 2d 843; No. 85-7026, 706 S. W. 2d 105; No. 85-7050, 255 Ga. 483, 340 S. E. 2d 9; No. 85-7063, 102 Nev. 158, 716 P. 2d 1387; No. 85-7070, 483 So. 2d 564; No. 85-7088, 707 S. W. 2d 365; No. 85-7089, 255 Ga. 588, 340 S. E. 2d 862; No. 85-7141, 483 So. 2d 578; No. 85-7236, 709 S. W. 2d 561; No. 86-106, 486 So. 2d 578; No. 86-5007, 718 P. 2d 354; No. 86-5109, 709 S. W. 2d 414; No. 86-5127, 255 Ga. 598,

340 S. E. 2d 869; No. 86–5206, 112 Ill. 2d 154, 492 N. E. 2d 1269; No. 86–5300, 101 Nev. 782, 711 P. 2d 856.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85–2023. ZAPATA OFFSHORE CO. ET AL. *v.* TIMCO, INC., ET AL. C. A. 5th Cir. Motion of Amoco Production Co. et al. for leave to file a brief as *amici curiae* out of time denied. Certiorari denied. Reported below: 784 F. 2d 628.

No. 85–2089. KIOWA TRIBE OF OKLAHOMA *v.* LEWIS ET UX.; and

No. 86–51. LEWIS ET UX. *v.* KIOWA TRIBE OF OKLAHOMA. C. A. 10th Cir. Motion of Cherokee Nation et al. for leave to file a brief as *amici curiae* in No. 85–2089 granted. Certiorari denied. Reported below: 777 F. 2d 587.

No. 85–2102. MONTAUK-CARIBBEAN AIRWAYS, INC., DBA LONG ISLAND AIRLINES *v.* HOPE ET AL. C. A. 2d Cir. Motion of Regional Airline Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 784 F. 2d 91.

No. 85–2141. FLORIDA LITERARY DISTRIBUTING CORP. *v.* CITY OF MIAMI. Sup. Ct. Fla. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment. Reported below: 486 So. 2d 569.

No. 85–2164. AMES ET AL. *v.* STANDARD OIL CO. C. A. D. C. Cir. Motion of respondent for award of double costs and attorney's fees denied. Certiorari denied.

No. 85–7010. KING *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner to consolidate the petition for writ of certiorari with No. 84–6075, *Tison* v. *Arizona* [certiorari granted, 475 U. S. 1010], denied. Certiorari denied. Reported below: 109 Ill. 2d 514, 488 N. E. 2d 949.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 85–7125. PHILLIPS *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 787 F. 2d 208.

No. 85–7152. FOSTER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. JUSTICE MARSHALL would grant the petition for writ of certiorari and set the case for oral argument. Reported below: 714 P. 2d 1031.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 85–7165. GRANDISON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 305 Md. 685, 506 A. 2d 580.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner Anthony Grandison was sentenced to death by an improperly instructed jury and did not have the benefit of representation at his sentencing hearing. Because I believe that the jury's instructions under the Maryland statute improperly shifted to petitioner the burden of disproving the appropriateness of his death sentence, and that the denial of a request for legal representation in the sentencing phase of a bifurcated capital proceeding constitutes a violation of the Sixth Amendment right to counsel, I dissent.

I

Petitioner was tried for murder, conspiracy to commit murder, and use of a handgun in the commission of a crime of violence, for hiring someone to kill two witnesses scheduled to testify against him in his trial on federal drug charges. The jury found petitioner guilty on all charges and sentenced him to death. Petitioner claims that the Maryland capital sentencing statute and the verdict sheet provided to the jury improperly imposed upon

him the burden of proof at the sentencing phase. I continue to believe that this issue is worthy of review. See *Huffington* v. *Maryland*, 478 U. S. 1023 (1986) (MARSHALL, J., dissenting from denial of certiorari); *Stebbing* v. *Maryland*, 469 U. S. 900 (1984) (MARSHALL, J., dissenting from denial of certiorari).

The State argues that petitioner's claim is foreclosed by a state-court construction of the statute holding that the prosecution bears the burden of persuasion. See *Foster* v. *State*, 304 Md. 439, 476–480, 499 A. 2d 1236, 1256–1257 (1985). In this case, however, the jury was provided with a verdict sheet that unambiguously directed the jurors to return a sentence of death *unless* mitigating circumstances outweighed aggravating circumstances. The Maryland Court of Appeals may construe the statute to avoid any constitutional difficulty. But the trial court's instructions and the verdict form submitted to the jury must reflect that construction. Here, the verdict form did not; the constitutional infirmity therefore remains undiminished.

II

At his arraignment, petitioner asserted the right to represent himself under *Faretta* v. *California*, 422 U. S. 806 (1975). Petitioner was informed of his right to counsel, the dangers of self-representation, and the advantages of having counsel to assist at trial and sentencing. Petitioner nonetheless chose to proceed *pro se*. He was granted the right to have "standby" counsel, but conducted his own defense. The jury returned a verdict of guilty on all counts.

At the first scheduled sentencing proceeding, petitioner asked the court to appoint the lawyer who had served as standby counsel to represent him in the sentencing proceeding. He also sought a continuance, since neither he nor his counsel was prepared to go forward. The court refused to terminate petitioner's self-representation, stating:

> "Once the decision is made regarding self-representation, if it is properly made prior to trial, the request to change rests solely within the discretion of the trial court. The right must be timely asserted. It must be asserted before the trial starts. Of course, this is not timely asserted. Whether we continue with it or not, what I am inclined to do about self-representation is leave it just like it is, and let [standby counsel] take over and handle the proceeding as standby counsel

with Mr. Grandison's permission. Grandison will still be the attorney." Pet. for Cert. 8–9.

Moreover, the court instructed standby counsel: "Keep in mind, Mr. Crawford, you are not the attorney in this. Mr. Grandison is his own attorney. You are just kind of a law clerk." *Id.*, at 9. The court granted an 8-day continuance; at the reconvened sentencing hearing, it again made clear that Grandison was representing himself, albeit with the assistance of standby counsel.

Assuming for the sake of argument that in a *non*bifurcated criminal proceeding a trial judge could in some circumstances deny a defendant who initially asserted his right to represent himself the right to later change his mind and proceed with counsel, such a rule would not imply that a waiver of counsel in the guilt phase of a capital proceeding requires a defendant to proceed *pro se*, against his will, in the sentencing phase. The Maryland Court of Appeals cursorily dismissed petitioner's claim that, because capital sentencing constituted a separate trial, he was entitled to make a new decision about whether he wanted counsel or not. 305 Md. 685, 752, 506 A. 2d 580, 613 (1986). I find this claim worthy of considerably more attention than the Maryland court gave it.

In *Bullington* v. *Missouri*, 451 U. S. 430 (1981), this Court held that the Double Jeopardy Clause applied to the sentencing phase of a bifurcated trial. It did so because it found that a sentencing hearing was like a separate trial. "The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment." *Id.*, at 438. Under the Maryland statute, Md. Ann. Code, Art. 27, § 413 (1982 and Supp. 1986), sentencing is similarly a separate adversarial proceeding, see § 413(a). It may require selection of a new jury, see §§ 413(b)(2)(i)–(iv). Evidence is offered, § 413(c)(1); the parties may present argument, § 413(c)(2); the jury is instructed, § 413(c)(3); and the jury deliberates and determines sentence. The Maryland proceeding is in all respects a separate trial on the issue of punishment. The waiver of the right to counsel at the first "trial" on guilt or innocence should therefore have no more bearing on a defendant's right to counsel in the sentencing phase than it would on that defendant's right to counsel in a separate trial on related crimes. It should under no circumstances irrevocably bind a defendant in the sentencing phase.

The trial court articulated no basis for refusing petitioner's request to appoint counsel. Even at midtrial in a nonbifurcated proceeding, a trial court's unexplained refusal to permit a defendant to revoke his assertion of the right to self-representation would surely constitute an abuse of discretion. A trial court cannot insist that a defendant continue representing himself out of some punitive notion that that defendant, having made his bed, should be compelled to lie in it. Yet in this case, where petitioner's right to counsel was triggered anew by the start of a new trial on the issue of punishment, the trial court refused, entirely without justification, to permit him to assert that right to counsel. This refusal deprived petitioner of his constitutional right to be represented during his sentencing hearing. Accordingly, I dissent.*

No. 85-7195. PLUMMER ET UX. *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE. C. A. 3d Cir. Certiorari before judgment denied.

No. 86-3. DALY *v.* DALY. Sup. Ct. Nev. Motion of Women Lawyer's Association of Los Angeles for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 102 Nev. 66, 715 P. 2d 56.

No. 86-25. BURGGRAF CORP. ET AL. *v.* GOODYEAR TIRE & RUBBER CO. ET AL. C. A. 10th Cir. Petition for writ of certiorari and/or mandamus denied.

No. 86-127. SHERLOCK *v.* MERCED UNION HIGH SCHOOL DISTRICT. C. A. 9th Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 788 F. 2d 1566.

No. 86-149. PATROFF *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the conviction. Reported below: 141 Ill. App. 3d 483, 490 N. E. 2d 148.

No. 86-211. PICCININ *v.* A. H. ROBINS CO., INC., ET AL.; and
No. 86-216. COMMITTEE OF REPRESENTATIVES OF DALKON SHIELD CLAIMANTS *v.* A. H. ROBINS CO., INC. C. A. 4th Cir.

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*I note in addition that petitioner raises issues related to those that will be before the Court in *California* v. *Brown*, No. 85-1563, to be argued later this Term. I would at the very least delay disposition of this petition until that case is decided.

Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.* Reported below: 788 F. 2d 994.

Rehearing Denied

No. 85-1584. NIEDZWIECKI *v.* CIRCUIT PROTECTIVE DEVICES, DIVISION OF WESTINGHOUSE ELECTRIC CORP., 476 U. S. 1110;

No. 85-5432. GOLDBLATT *v.* VOGEL ET AL., 474 U. S. 952; and

No. 85-6676. NEAL *v.* ILLINOIS, 476 U. S. 1165. Petitions for rehearing denied.

No. 85-5942. COTTON *v.* FEDERAL LAND BANK OF COLUMBIA, 474 U. S. 1104; and

No. 85-6527. GRAY *v.* CODY, ATTORNEY GENERAL OF TENNESSEE, ET AL., 476 U. S. 1184. Motions for leave to file petitions for rehearing denied.

OCTOBER 8, 1986

Dismissal Under Rule 53

No. 85-2137. BUHLER-MAIG, INC. *v.* DEMPSTER ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 786 F. 2d 1161.

OCTOBER 10, 1986

Dismissal Under Rule 53

No. 86-55. WITCO CHEMICAL CORP. *v.* PEACHTREE DOORS, INC., ET AL. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 787 F. 2d 1545.

Miscellaneous Order

No. A-269. DELUNA *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153,

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*See also note, p. 801.

227, 231 (1976), we would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

OCTOBER 14, 1986

Affirmed on Appeal

No. 85-1886. NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES ET AL. *v.* HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL. Affirmed on appeal from D. C. D. C. Reported below: 633 F. Supp. 511.

Appeals Dismissed

No. 86-236. MARENO *v.* ROBERTS, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 3d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 113 App. Div. 2d 987, 493 N. Y. S. 2d 660.

No. 86-257. POINTON, DBA SIERRA POINTON FUND, INC. *v.* FIDELITY NATIONAL BANK, N. A. Appeal from Ct. App. Okla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86-302. CHISUM *v.* RAVINE ET AL. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86-5358. PERKINS *v.* HARTIGAN, ATTORNEY GENERAL OF ILLINOIS, ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86-265. G & M RICHMOND *v.* CITY OF RICHMOND HEIGHTS, OHIO. Appeal from Ct. App. Ohio, Cuyahoga County, dismissed for want of substantial federal question.

No. 86-5329. SAADIQ *v.* IOWA. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question. Reported below: 387 N. W. 2d 315.

No. 86–287. CROWN OIL CORP. ET AL. *v.* LAPIDUS POPCORN, INC. Appeal from Ct. App. Cal., 1st App. Dist. Motion of Atlantic Richfield Co. et al. for leave to file a brief as *amici curiae* granted. Appeal dismissed for want of jurisdiction. Reported below: 177 Cal. App. 3d 604, 223 Cal. Rptr. 164.

Certiorari Granted—Vacated and Remanded

No. 86–288. RHODE ISLAND *v.* MATTATALL. Sup. Ct. R. I. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986). Reported below: 510 A. 2d 947.

Miscellaneous Orders

No. A–202. KHABIRI ET AL. *v.* TOLL ET AL. Application for injunction and other relief, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–262 (86–567). CURRY ET AL. *v.* BAKER ET AL. C. A. 11th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 106, Orig. ILLINOIS *v.* KENTUCKY. Motion for leave to file bill of complaint granted. Defendant is allowed 60 days within which to file an answer.

No. 85–781. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, ET AL. *v.* BARNES ET AL. C. A. D. C. Cir. [Certiorari granted, 475 U. S. 1044.] Motion of respondents for divided argument denied. JUSTICE SCALIA took no part in the consideration or decision of this motion.

No. 85–1329. YOUNG ET AL. *v.* UNITED STATES EX REL. VUITTON ET FILS S. A. ET AL.; and

No. 85–6207. KLAYMINC *v.* UNITED STATES EX REL. VUITTON ET FILS S. A. ET AL. C. A. 2d Cir. [Certiorari granted, 477 U. S. 903.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–5939. CRUZ *v.* NEW YORK. Ct. App. N. Y. [Certiorari granted, 476 U. S. 1168.] Motion of the Solicitor General

for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–1384. TURNER ET AL. *v.* SAFLEY ET AL. C. A. 8th Cir. [Certiorari granted, 476 U. S. 1139.] Motions of The Correctional Association of New York, Prisoners' Legal Services of New York, Inc., et al., and Guadalupe Guajardo, Jr., et al. for leave to file briefs as *amici curiae* granted.

No. 85–1589. IOWA MUTUAL INSURANCE CO. *v.* LAPLANTE ET AL. C. A. 9th Cir. [Certiorari granted, 476 U. S. 1139.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 86–279. BASIC INC. ET AL. *v.* LEVINSON ET AL. C. A. 6th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. THE CHIEF JUSTICE took no part in the consideration or decision of this order.

No. 86–569. GRADDICK, ATTORNEY GENERAL OF ALABAMA *v.* HENDERSON ET AL. Appeal from D. C. M. D. Ala. Motion of appellant to expedite consideration of the statement as to jurisdiction denied.

No. 86–5306. WILLIS *v.* LANE, JUDGE, ET AL. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 4, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86–5290. IN RE PLUMMER ET UX. C. A. 3d Cir. Petition for writ of common-law certiorari denied. Reported below: 800 F. 2d 1137.

No. 86–5363. IN RE JOHNSON;
No. 86–5502. IN RE MORROW; and
No. 86–5531. IN RE JACOBS. Petitions for writs of habeas corpus denied.

No. 86–5284. IN RE HENKEL; and

No. 86–5357. IN RE OWENS. Petitions for writs of mandamus denied.

Probable Jurisdiction Postponed

No. 85–673. HARTIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL. Appeal from C. A. 7th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits, which is limited to Question 1 presented by the jurisdictional statement. Reported below: 763 F. 2d 1532.

Certiorari Granted

No. 85–1772. UTAH DIVISION OF STATE LANDS *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 780 F. 2d 1515.

No. 85–1835. CALIFORNIA *v.* ROONEY. Ct. App. Cal., 2d App. Dist. Certiorari granted. Reported below: 175 Cal. App. 3d 634, 221 Cal. Rptr. 49.

No. 85–1722. O'LONE, ADMINISTRATOR, LEESBURG PRISON COMPLEX, ET AL. *v.* ESTATE OF SHABAZZ ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 782 F. 2d 416.

No. 86–108. HILTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. *v.* BRAUNSKILL. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted.

No. 85–6725. BOURJAILY *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted and certiorari granted limited to the following questions:

"1. Whether, in order to admit an alleged co-conspirator's declarations against a defendant under Federal Rule of Evidence 801(d)(2)(E), the court must determine by independent evidence a) that a conspiracy existed, and b) that the declarant and the defendant were members of this conspiracy?

"2. Assuming that the court must make these determinations, upon what quantum of independent proof must they be based?

"3. Whether, as a requirement for the admission of a co-conspirator's statement against a defendant, the court must assess the circumstances of the case to determine whether the statement

carries with it sufficient indicia of reliability?" Reported below: 781 F. 2d 539.

No. 86-5020. BOOTH *v.* MARYLAND. Ct. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* granted and certiorari granted limited to Question 3 presented by the petition. Reported below: 306 Md. 172, 507 A. 2d 1098.

Certiorari Denied. (See also Nos. 86-236, 86-257, 86-302, 86-5358, and 86-5290, *supra.*)

No. 85-1869. HOOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 781 F. 2d 1166.

No. 85-1883. MAROTTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 782 F. 2d 386.

No. 85-1974. WHITTINGTON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1210 and 786 F. 2d 644.

No. 85-2134. ESTATE OF GILMORE, BY GILMORE, EXECUTOR *v.* BUCKLEY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 787 F. 2d 714.

No. 85-2157. ALUMINUM ASSN., INC., ET AL. *v.* NORFOLK & WESTERN RAILWAY CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 256, 768 F. 2d 373.

No. 85-6884. RAHMAN ET AL. *v.* GREY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1027.

No. 85-7124. CAREY *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 715 P. 2d 244.

No. 85-7128. TAYLOR *v.* MARQUEZ. C. A. 9th Cir. Certiorari denied.

No. 86-8. MASI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 86-9. QUINN *v.* ROBINSON, UNITED STATES MARSHAL FOR NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 776.

No. 86-24. EGGLESTON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 787 F. 2d 939.

No. 86–28. NORFOLK DREDGING CO. *v.* SECRETARY OF LABOR. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 1526.

No. 86–38. NEAL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied.

No. 86–41. LACHANCE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 856.

No. 86–42. G. D. SEARLE & CO. *v.* COHN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 784 F. 2d 460.

No. 86–47. UNIGLASS INDUSTRIES, A DIVISION OF UNITED MERCHANTS & MANUFACTURERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 1128.

No. 86–50. JANKLOW *v.* NEWSWEEK, INC. C. A. 8th Cir. Certiorari denied. Reported below: 788 F. 2d 1300.

No. 86–74. GULF OIL CORP. *v.* DANOS & CUROLE MARINE CONTRACTORS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 518.

No. 86–91. JERSAWITZ *v.* NOONAN, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 1532.

No. 86–93. MENOKEN *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 784 F. 2d 365.

No. 86–102. SINGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 785 F. 2d 228.

No. 86–105. FOSTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 789 F. 2d 457.

No. 86–148. BENZVI ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 787 F. 2d 1541.

No. 86–166. SYLVIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 791 F. 2d 926.

No. 86–167. AMERICAN CAST IRON PIPE CO. *v.* COX ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 1546.

No. 86-186. DAY & ZIMMERMAN, INC. *v.* INTERNATIONAL CHEMICAL WORKERS UNION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 791 F. 2d 366.

No. 86-210. SPECTOR ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 790 F. 2d.51.

No. 86-215. J. A. LAPORTE, INC. *v.* NORFOLK DREDGING CO. C. A. Fed. Cir. Certiorari denied. Reported below: 787 F. 2d 1577.

No. 86-220. WALDRON ET AL. *v.* COLLINS. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 736.

No. 86-221. TOWNSHIP OF CLAY *v.* SEAWAY DRIVE-IN, INC. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 447.

No. 86-229. BROOKS *v.* EBONY OIL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 136.

No. 86-230. NICHOLSON ET AL. *v.* KING. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 485 So. 2d 578.

No. 86-232. BEHREND ET AL. *v.* ZIEGLER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 792 F. 2d 138.

No. 86-233. CITY OF LAWTON, OKLAHOMA, ET AL. *v.* LUSBY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 796 F. 2d 1307.

No. 86-237. KOEHNKE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 128 Wis. 2d 557, 381 N. W. 2d 621.

No. 86-245. HUMBOLDT BAY MUNICIPAL WATER DISTRICT *v.* LOUISIANA-PACIFIC CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 787 F. 2d 597.

No. 86-247. GENERAL SIGNAL CORP. *v.* ALLIED TUBE & CONDUIT CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 95.

No. 86-249. ATRAQCHI ET AL. *v.* FOUR UNKNOWN AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 167.

No. 86-255. KUZMIAK *v.* KUZMIAK. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 176 Cal. App. 3d 1152, 222 Cal. Rptr. 644.

No. 86-269. WHITE *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 252 U. S. App. D. C. 104, 787 F. 2d 660.

No. 86-273. TEXAS *v.* DANIELS, AKA AUSTIN. Ct. Crim. App. Tex. Certiorari denied. Reported below: 718 S. W. 2d 702.

No. 86-274. SARKISIAN ET AL. *v.* TRAVELERS INDEMNITY CO. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 754.

No. 86-292. DONLEY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 791 F. 2d 383.

No. 86-297. RUSSELL *v.* TEXAS. Ct. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 685 S. W. 2d 413.

No. 86-299. HUTCHISON *v.* THOMAS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 789 F. 2d 392.

No. 86-301. LIEDTKE *v.* BUJOLD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1171.

No. 86-305. REYNOLDS *v.* INGALLS SHIPBUILDING DIVISION, LITTON SYSTEMS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 264.

No. 86-309. WALKER ET AL. *v.* HURON VALLEY HOSPITAL, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 792 F. 2d 563.

No. 86-317. ROSENE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 94.

No. 86-324. AMADOR *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1013.

No. 86-333. BARBER ET AL. *v.* AMERICAN AIRLINES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 791 F. 2d 658.

No. 86–346. KAUFMAN *v.* BERKMAN, RUSLANDER, POHL, LIEBER & ENGEL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1134.

No. 86–383. PACIFICO CREATIVE SERVICE, INC., DBA JALPAK, ET AL. *v.* HENNEGAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 787 F. 2d 1299.

No. 86–398. GEBRAYEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 1567.

No. 86–413. SIKES ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 789 F. 2d 1492.

No. 86–429. BLOCH *v.* MOUNTAIN MISSION SCHOOL, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 789 F. 2d 915.

No. 86–432. MILLER *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 794 F. 2d 660.

No. 86–5009. SPENCE *v.* TOOLE. C. A. 11th Cir. Certiorari denied. Reported below: 781 F. 2d 904.

No. 86–5068. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 939.

No. 86–5094. CARTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 1294.

No. 86–5281. BURKS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 86–5283. BENNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 792 F. 2d 140.

No. 86–5285. HEMPHILL *v.* OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 1291.

No. 86–5294. CLANTON *v.* DUTTON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 588.

No. 86–5295. RYDER *v.* JESSUP & BEECHER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–5298. JIMENEZ *v.* TEXAS DEPARTMENT OF CORRECTIONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1111.

No. 86–5301. COLLIER *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 86–5302. HOLMES *v.* TAYLOR ET AL. Sup. Ct. S. C. Certiorari denied.

No. 86–5303. BRENT *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 790 F. 2d 83.

No. 86–5304. WATKINS *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 86–5305. WALTER *v.* TORRES. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 1039.

No. 86–5308. ROGERS *v.* REDMAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 471.

No. 86–5311. CISNEROS *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 720 P. 2d 982.

No. 86–5316. VESAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 86–5317. THOMSEN *v.* LEVINE, COMMISSIONER, DEPARTMENT OF HUMAN SERVICES. Ct. App. Minn. Certiorari denied. Reported below: 386 N. W. 2d 324.

No. 86–5318. RODMAN *v.* MCMACKIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1415.

No. 86–5319. GIBSON *v.* KIVETT ET AL. C. A. 4th Cir. Certiorari denied.

No. 86–5323. DILLARD *v.* IDAHO. Ct. App. Idaho. Certiorari denied. Reported below: 110 Idaho 834, 718 P. 2d 1272.

No. 86–5326. MCCLURE *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 86–5330. OTWORTH *v.* SOUTHERN PACIFIC TRANSPORTATION CO. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 167.

No. 86–5333. PRATT *v.* IGNACIO. C. A. 9th Cir. Certiorari denied. Reported below: 787 F. 2d 597.

No. 86-5334. ROBERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 891.

No. 86-5338. LACY *v.* GARDINO, SUPERINTENDENT, NORTHEASTERN CORRECTIONAL CENTER, CONCORD. C. A. 1st Cir. Certiorari denied. Reported below: 791 F. 2d 980.

No. 86-5340. PATTON *v.* THIERET, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 791 F. 2d 543.

No. 86-5346. MIESBAUER *v.* KANSAS. C. A. 10th Cir. Certiorari denied.

No. 86-5347. KAY *v.* CITY OF OAKLAND, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1122.

No. 86-5348. ANDERSON *v.* VANTAGE PRESS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 456.

No. 86-5350. WANDLE *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 75 Ore. App. 746, 707 P. 2d 1281.

No. 86-5352. WEBER *v.* WILLARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 145.

No. 86-5354. GEURIN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 86-5355. RUSSELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 86-5359. DEDIC *v.* ILLINOIS HUMAN RIGHTS COMMISSION ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 137 Ill. App. 3d 1149, 499 N. E. 2d 173.

No. 86-5383. BOITZ *v.* ARCO ALASKA INC. ET AL. Sup. Ct. Alaska. Certiorari denied.

No. 86-5384. BONIN *v.* T. L. JAMES & CO., INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 86-5385. WILLIAMS *v.* ALABAMA DEPARTMENT OF PENSIONS AND SECURITY ET AL. C. A. 11th Cir. Certiorari denied.

No. 86-5398. VOSS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 787 F. 2d 393.

No. 86-5399. BAUER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 86-5400. ZWICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 938.

No. 86-5402. BENSON *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied.

No. 86-5406. WEBER *v.* HOAGUE ET AL. C. A. 11th Cir. Certiorari denied.

No. 86-5416. TORRES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 793 F. 2d 436.

No. 86-5417. JENKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1123.

No. 86-5423. WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 1387.

No. 86-5427. MAK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 1129.

No. 86-5429. KELLY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 575.

No. 86-5441. COOK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 794 F. 2d 561.

No. 86-5461. FESSLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1416.

No. 86-5462. BOSCHETTI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 416.

No. 86-5506. WILLIAMS *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 789 F. 2d 918.

No. 85-1731. AUTOMOBILE CLUB OF MICHIGAN ET AL. *v.* ROBERTS ET AL. Ct. App. Mich. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 138 Mich. App. 488, 360 N. W. 2d 224.

No. 85-7230. FERRER-MAZORRA ET AL. *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 788 F. 2d 1446.

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No. 85–1915. CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA *v.* PONCE ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 774 F. 2d 1401.

No. 85–2031. UNITED STATES *v.* SCHWARTZ ET AL. C. A. 9th Cir. Motion of respondent Raymond F. Lane for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion and this petition. Reported below: 785 F. 2d 673.

No. 85–2071. OKLAHOMA *v.* POST. Ct. Crim. App. Okla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 715 P. 2d 1105.

No. 86–315. RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* GREENAWALT. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 784 F. 2d 1453.

No. 85–2133. CROUNSE CORP. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL.; and

No. 86–134. SIMMONS *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of these petitions. Reported below: 781 F. 2d 1176.

No. 86–5269. CADAVID *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 251 U. S. App. D. C. 327, 784 F. 2d 1131.

No. 85–2168. FLEMING *v.* MOORE. Sup. Ct. Va. Motions of Philadelphia Inquirer et al. and National Association for the Advancement of Colored People for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 85–6753. COMPTON *v.* NEW MEXICO. Sup. Ct. N. M.;

No. 85–7122. KENNEDY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla.;

No. 86–5021. BOWERS *v.* MARYLAND. Ct. App. Md.; and

No. 86–5327. GILREATH *v.* KEMP, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: No. 85–6753, 104 N. M. 683,

726 P. 2d 837; No. 85–7122, 483 So. 2d 424; No. 86–5021, 306 Md. 120, 507 A. 2d 1072.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85–6889. DUFOUR *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 483 So. 2d 307.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Mississippi insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I nevertheless would grant certiorari because this petition presents an important issue concerning the application of this Court's decision in *Strickland* v. *Washington*, 466 U. S. 668 (1984).

I

Petitioner Donald Dufour was convicted of capital murder occurring in the course of a robbery. His appointed counsel presented no evidence in mitigation of sentence at the penalty phase of his trial. The jury found that the State had established two aggravating circumstances and recommended a sentence of death. The State Supreme Court affirmed petitioner's conviction and death sentence. *Dufour* v. *State*, 453 So. 2d 337 (1984). This Court denied certiorari. *Dufour* v. *Mississippi*, 469 U. S. 1230 (1985). Petitioner then instituted a postconviction proceeding to vacate judgment and sentence in the state trial court, contending that he

had received ineffective assistance of counsel in that his appointed trial counsel had failed to request appointment of a psychiatrist to assist the defense in developing psychological evidence to be submitted to the jury in mitigation of sentence. The trial court summarily denied this and petitioner's other claims, and the State Supreme Court affirmed. 483 So. 2d 307 (1986).

It appears that in his postconviction application, petitioner again requested appointment of a psychiatrist to assist counsel in showing that petitioner's defense at the penalty phase of his trial was prejudiced by the absence of psychological evidence. He submitted the affidavit of Dr. Stanley, the court-appointed psychiatrist who had previously examined him for the purpose of determining his competency to stand trial. Dr. Stanley stated that the limited examination he had conducted for purposes of determining competency bore no relation to the more extensive and qualitatively different investigation required to present useful assistance to trial counsel on the subject of mitigation. Pet. for Cert. 7. Both the trial court and State Supreme Court denied relief without ruling on petitioner's renewed request for the appointment of a psychiatrist; no evidentiary hearing was held on petitioner's claim of ineffective assistance. The State Supreme Court affirmed the denial of relief, stating:

> "Petitioner claims that defense counsel failed to make application to the trial court for funds to conduct a psychological evaluation of petitioner for the purpose of determining whether mitigating circumstances existed. Further, that he had no expert assistance because counsel did not request it. However, petitioner was examined pursuant to a court order. The professionals were not people selected by the State, but by the trial court. Petitioner has failed to present facts which show there existed mitigating circumstances of a psychological nature, which could have been presented by Dr. Stanley. It is not shown that such an examination would have produced the claimed results, nor has prejudice been shown." 483 So. 2d, at 308.

II

In *Strickland*, *supra*, this Court established a two-part standard for evaluating claims of ineffective assistance of counsel. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed

the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687. For the reasons I then stated in dissent, I continue to believe that "a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby." *Id.*, at 712. The present case provides a graphic demonstration of the untenable nature of the prejudice standard announced in *Strickland*.

The State Supreme Court, in affirming the denial of postconviction relief on this claim, relied entirely upon the prejudice portion of the *Strickland* standard. 483 So. 2d, at 308. Petitioner's claim was denied because he did not proffer the psychiatric evidence which he contended should have been introduced at trial. He did not do so precisely because, as an indigent, he could not afford to retain a psychiatrist to make an examination either in preparation for trial or upon his application for postconviction relief. In short, the prejudice standard in such a circumstance is insurmountable; prejudice cannot be shown because the alleged error of counsel was in failing to seek the appointment of an expert without whose assistance the evidence which would show prejudice cannot be brought to light. On a claim of this kind petitioner cannot submit affidavits of witnesses who were not investigated or who were not called, or in some other manner raise an inference as to prejudice. The essence of psychiatric evidence rests in the expert qualifications of the objective examiner; if the examiner will not volunteer his services, petitioner must content himself with only so much justice as he can pay for.

In *Ake* v. *Oklahoma*, 470 U. S. 68, 80 (1985), this Court recognized that under some circumstances "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense," and that in these conditions the accused is entitled to the appointment of psychiatric assistance at public expense. That the failure to seek such appointment to assist counsel in the development of evidence in mitigation of sentence may in some cases rise to the level of constitutionally ineffective assistance I do not

doubt.[1] "[C]ounsel's general duty to investigate . . . takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care." *Strickland*, 466 U. S., at 706 (BRENNAN, J., concurring in part and dissenting in part).[2] The prejudice prong of *Strickland*, as it was applied below, will have the effect of depriving all such defendants of their constitutional rights solely as a result of their indigence. Because I believe that such application of the *Strickland* standard is incompatible with the requirements of the Constitution, I would grant the petition for certiorari.

No. 85–6964. BUNDY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 471 So. 2d 9.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Petitioner was convicted of first-degree murder and sentenced to death. His conviction was based on evidence the Florida Supreme Court found constitutionally suspect. The Florida Supreme Court nonetheless concluded that admission of the evidence was harmless constitutional error. I would grant certiorari to review the Florida Supreme Court's application of *Schneble* v. *Florida*, 405 U. S. 427 (1972), and *Fahy* v. *Connecticut*, 375 U. S. 85 (1963).

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[1] I would not reach the question whether counsel's failure in this case to move for the appointment of a psychiatrist was constitutionally deficient representation under the first part of the test established by *Strickland* v. *Washington*, 466 U. S. 668 (1984). The correctness of the State Supreme Court's determination on the question of prejudice is the sole issue posed by the petition.

[2] I note that petitioner's trial counsel failed to present any evidence at all in mitigation of sentence. As I have previously stated, I believe that in all but the most extraordinary cases, such failure is, without more, a denial of effective assistance of counsel. See *Berry* v. *King*, 476 U. S. 1164 (1986) (MARSHALL, J., dissenting from denial of certiorari).

I

Petitioner became a suspect in the disappearance of Kimberly Leach after local authorities learned that he was suspected in a number of murders in the northwestern United States. Leach was reported missing from school on February 9, 1978, and her body was found two months later, after a highly publicized search. The only eyewitness to the abduction was Clarence Anderson. He came forward on July 18, after seeing petitioner on a television newscast. At that time, Anderson was unable to identify the date of his observation, although he thought it was "around April," and he could not provide a detailed description of the man or the girl he had observed. App. to Pet. for Cert. A17–A21. At the request of the Assistant State Attorney, Anderson underwent *two* hypnotic sessions designed to refresh his recollection.

Petitioner moved to suppress Anderson's testimony due to the lapse of time between Leach's disappearance and his initial statement, the massive publicity surrounding her disappearance and petitioner's arrest and indictment, and an alleged misuse of hypnosis by the persons conducting the sessions. He maintained that these factors rendered Anderson's identification unreliable under the rule established by this Court's decision in *Neil* v. *Biggers*, 409 U. S. 188 (1972). At the suppression hearing, several experts testified that a witness whose recollection has been hypnotically refreshed is unable to distinguish between what he recollected before hypnosis and any "details" added during hypnosis.

The trial court denied petitioner's motion to suppress. At trial, Anderson testified that he had observed a man leading a young girl into a white van near Leach's junior high school on February 9, 1978. He identified the man as petitioner and the girl as Kimberly Leach. Anderson's testimony was vital to the State's case; it supplied "the crucial link in the chain of circumstantial evidence of [petitioner's] guilt." 471 So. 2d 9, 23 (Fla. 1985) (Boyd, C. J., concurring specially).

On appeal, the Florida Supreme Court agreed with petitioner's arguments against the use of hypnotically refreshed testimony. *Id.*, at 18. The court noted that the highest courts of several other States have categorically excluded hypnotically refreshed testimony. *E. g.*, *People* v. *Shirley*, 31 Cal. 3d 18, 641 P. 2d 775, cert. denied, 458 U. S. 1125 (1982); *People* v. *Gonzales*, 415 Mich. 615, 329 N. W. 2d 743 (1982). The court discussed several of the problems associated with such testimony, not the least of which is

its effect on the defendant's right under the Confrontation Clause of the Sixth Amendment to cross-examine witnesses against him. The Florida court noted the "'danger of distortion, delusion, or fantasy,'" as well as "'the barriers which hypnosis raises to effective cross-examination.'" 471 So. 2d, at 18 (quoting *People* v. *Gonzales*, *supra*, at 627, 329 N. W. 2d, at 748). Furthermore, the court recognized the danger that, after undergoing hypnosis,

> "the subject (1) will lose his critical judgment and begin to credit 'memories' that were formerly viewed as unreliable, (2) will confuse actual recall with confabulation and will be unable to distinguish between the two, and (3) will exhibit an unwarranted confidence in the validity of his ensuing recollection." 471 So. 2d, at 17 (quoting *People* v. *Shirley*, *supra*, at 39, 641 P. 2d, at 787).

The Florida Supreme Court concluded, in a holding to which it gave only prospective effect, that "hypnotically refreshed testimony is *per se* inadmissible in a criminal trial in this state, but hypnosis does not render a witness incompetent to testify to those facts demonstrably recalled prior to hypnosis." 471 So. 2d, at 18.

II

Since petitioner was convicted and sentenced to death after a trial in which the "crucial link" was supplied by a witness with extremely limited prehypnotic memory who had undergone *two* hypnotic sessions, the Florida Supreme Court should have overturned his conviction. Instead, the court somehow determined that Anderson's testimony was refreshed under hypnosis as to *only three details:* the color of the football jersey the girl was wearing, the numbers on the jersey, and the fact that the man was wearing a pullover sweater and a shirt. Then, purporting to apply the "harmless-constitutional-error rule" of *Schneble* v. *Florida*, 405 U. S. 427 (1972), and *Fahy* v. *Connecticut*, 375 U. S. 85 (1963), the court concluded: "[S]ufficient evidence does exist, absent the tainted testimony, upon which the jury could have based its conviction of Bundy. There is no reasonable possibility that the tainted testimony complained of might have contributed to the conviction." 471 So. 2d, at 19.

This review for harmless constitutional error is seriously flawed. First, the Florida court improperly based its enumeration of tainted testimony on *Anderson's own testimony at trial.*

App. to Pet. for Cert. A86–A87. Anderson's own assessment of the impact of hypnosis on his recollection was inherently unreliable and was not subject to effective cross-examination, for the very reasons the court relied upon in holding that such evidence would in the future be inadmissible. The hypnotically refreshed "recollection" of the precise date of his observation is the most glaring omission from Anderson's list.[1] Having identified constitutional error in the admission of hypnotically refreshed testimony, the Florida Supreme Court was not free to excise a fraction of that evidence and conclude that the rest could not have contributed to the conviction. Second, the Florida court evidently confused review for harmless constitutional error with review for sufficiency of the evidence, despite this Court's explanation of the difference in *Fahy:* "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U. S., at 86–87. Cf. *Delaware* v. *Van Arsdall*, 475 U. S. 673, 684 (1986); *Chapman* v. *California*, 386 U. S. 18, 23 (1967). When the evidence admitted at petitioner's trial is reviewed in this light it becomes clear that the tainted testimony significantly bolstered the State's case against him, for the untainted evidence was far from overwhelming.

"We must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence . . . though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." *Id.*, at 22. Because the Florida Supreme Court misapplied the harmless-constitutional-error rule in such a way as to

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[1] One of petitioner's experts testified at the pretrial suppression hearing that Anderson's testimony was "enhanced" by numerous details in addition to the date of the occurrence and the three items listed by Anderson. These enhancements included what Anderson was doing on that day, the man's weight, the fact that he was clean shaven, the description of the van, and the fact that he could see the man and the girl through its rear window. Pet. for Cert. 12. The court below evidently ignored this portion of the record in reaching its conclusion as to harmless error.

place in doubt the reliability of a verdict in a capital case, I would grant the petition for certiorari.[2]

No. 85-6977. PORTER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 111 Ill. 2d 386, 489 N. E. 2d 1329.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I would grant this petition for certiorari to consider the extent of the obligations our decision in *Smith* v. *Phillips*, 455 U. S. 209 (1982), imposes on a trial judge confronted with a claim of juror bias.

I

Petitioner Anthony Porter was convicted of two murders committed in the course of an armed robbery and was sentenced to death. During *voir dire*, the trial judge read a list of potential witnesses, including the mother of Marilyn Green, one of the victims. He did not ask whether any of the prospective jurors knew any of the persons on the list, and none of them volunteered that they did. After the jury returned a guilty verdict, petitioner waived his right to a jury at the penalty proceeding. Before the judge dismissed the jurors, however, he addressed them as follows:

> "THE COURT: . . . It was brought to my attention before I actually formally dismissed you that one of the jurors stated that he knew that some other juror purportedly or allegedly went to church—to the same church as one of the decedent's mother. Is that right, was that you—please identify yourself.
>
> "MRS. TRICKLET:[*] Yes, but that didn't make any difference to me about that.
>
> "THE COURT: Thank you, ma'am. It didn't make any difference?
>
> "MRS. TRICKLET: No.

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[2] Since the Florida Supreme Court found constitutional error and the State has not cross-petitioned for certiorari on that question, this Court is not called upon to decide whether admission of hypnotically refreshed testimony in a criminal trial violates the Due Process Clause of the Fourteenth Amendment or the Confrontation Clause of the Sixth Amendment. Accordingly, I express no view on this question.

*The trial transcript incorrectly lists the juror's name as Tricklet, rather than Trigleth.

"THE COURT: Ma'am, your name again?

"MRS. TRICKLET: Lilly B. Tricklet.

"THE COURT: It didn't make any difference to you, you abided by your oath and did you recognize the fact when I had read you the name of all the witnesses in the beginning before we even started, you didn't recognize that?

"MRS. TRICKLET: No.

"THE COURT: When did you finally recognize—

"MRS. TRICKLET: After it had got started and everything was going on.

"THE COURT: But, it made no difference to you, is that right?

"MRS. TRICKLET: No, that is right.

"THE COURT: I will now formally dismiss you. You are all dismissed." 111 Ill. 2d 386, 397–398, 489 N. E. 2d 1329, 1333 (1986).

Defense counsel was not permitted to question Mrs. Trigleth. After he suggested that "the Court should have questioned this juror in detail as to her relationship to that family," *id.*, at 398, 489 N. E. 2d, at 1334, the judge made the following statement:

"This Court will state for the record that in an unusual proceeding, I think probably the most unusual I have ever engaged in in all my years as a lawyer and as a Judge, I did bring back the entire jury and I had not dismissed them and the lady that identified herself was under oath and said for the record that the facts that came to light after the case, sometime after the case had commenced, in earnest, didn't influence her whatsoever.

"Accordingly, this Court felt that going beyond that regarding that issue is not—*would not have been proper, would have invaded the sanctity of the jury and jury deliberation.* Mr. Porter talked to and did, in fact request and have his constitutional right to a jury. That lady was under oath. She was not on trial, Mr. Porter was." *Id.*, at 413–414, 489 N. E. 2d, at 1341 (emphasis supplied).

Petitioner moved for a new trial. He submitted the affidavit of Isaias Torres, the juror who had brought the matter to the court's attention. In his affidavit, Torres stated that "a fellow juror informed him that another juror sitting in judgment of the facts

with them . . . knew the deceased, Marilyn Green's mother and attended church with her." *Id.*, at 402, 489 N. E. 2d, at 1335. He further stated that "this same Black female juror, when the jury was given the case to deliberate on, entered the jury room and said *as far as she was concerned, they could vote guilty right then*, and she made this statement before any discussion was had on the evidence . . . ." *Ibid.* (emphasis supplied). At the hearing on petitioner's motion for a new trial, which was held before the same judge, Mrs. Trigleth was not called as a witness. After a brief oral argument, the judge denied the motion.

The Illinois Supreme Court affirmed the trial court's denial of petitioner's motion for a new trial, with three justices dissenting. Although the State Supreme Court recognized that the trial court's inquiry "could have, and possibly should have, been more searching," it considered the ruling to be within the trial judge's "sound discretion." *Id.*, at 403, 489 N. E. 2d, at 1336. The State Supreme Court concluded: "The burden in this case was on the defendant to support the allegations of his post-trial motion. . . . Not only should the defendant have shown the nature of the relationship between the juror and the victim's mother, but he also had the burden of showing that he was prejudiced by this juror's service." *Id.*, at 404, 489 N. E. 2d, at 1336.

II

The right to a trial by an impartial jury lies at the heart of due process. See, *e. g.*, *Irvin* v. *Dowd*, 366 U. S. 717, 721–722 (1961). This Court has held that due process requires both "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith* v. *Phillips*, 455 U. S., at 217. When a substantial question of juror bias is presented to the trial court, as it was in this case, we have held that the defendant is entitled to a hearing "'with all interested parties permitted to participate.'" *Id.*, at 216 (quoting *Remmer* v. *United States*, 347 U. S. 227, 230 (1954)).

Under *Smith* v. *Phillips*, *supra*, the trial judge's inquiry into juror bias in this case fell far short of the minimum required by the Due Process Clause of the Fourteenth Amendment. The judge merely called on the juror to identify herself and then asked her "several times in a leading fashion to reaffirm that her ac-

quaintance with the mother did not influence her" in a colloquy that "could have lasted only seconds." 111 Ill. 2d, at 410, 489 N. E. 2d, at 1339 (Simon, J., dissenting). The trial judge failed to ascertain to any meaningful degree the extent and nature of her relationship with the victim's mother and the point at which she became aware that she was acquainted with the mother. The juror's vague statement that she realized it "[a]fter it had got started and everything was going on" suggests only that she was not aware of it at *voir dire*. She was never asked to explain why she had not brought the matter to the court's attention when she realized the connection; had she done so, one of the alternate jurors could have taken her place. Moreover, the trial court did not allow defense counsel to question her.

The State contends that petitioner had an opportunity to explore the issue of bias at the post-trial hearing on his motion for a new trial. That hearing, however, was woefully inadequate when measured by our decisions in *Phillips* and *Remmer*. At a minimum, due process requires that the defendant be allowed to question the juror on the issue of bias. See *Smith* v. *Phillips*, 455 U. S., at 217, n. 7 ("[D]eterminations made in *Remmer*-type hearings will frequently turn upon testimony of the juror in question"); see also *id.*, at 222 (O'CONNOR, J., concurring). The Illinois Supreme Court criticized defense counsel for failing to call Mrs. Trigleth or obtain an affidavit from her, 111 Ill. 2d, at 403, 489 N. E. 2d, at 1336. However, in light of the trial judge's insistence on the sanctity of the jury's deliberation and his refusal to allow defense counsel to question Mrs. Trigleth while she was under oath, counsel reasonably considered himself foreclosed from contacting her in connection with his motion for a new trial before the same judge. Thus, while petitioner had the burden of showing both bias and actual prejudice, the trial judge's admonitions appeared to deprive him of the only means of doing so.

I continue to believe that the defendant should not bear the burden of showing actual prejudice when the probability of bias is substantial, as it is in this case, see *Smith* v. *Phillips*, *supra*, at 224 (MARSHALL, J., dissenting). However, petitioner never even had the opportunity of demonstrating prejudice due to juror bias. This violated his right to due process and leaves in doubt the impartiality of the jury that convicted him in this capital case. Accordingly, I dissent from denial of the petition for certiorari.

No. 85–7071. BUTTRUM *v.* BLACK, WARDEN. Sup. Ct. Ga. Certiorari denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Petitioner was convicted of murder and sentenced to death. Her conviction and sentence were affirmed on direct appeal, and this Court denied certiorari. *Buttrum* v. *State*, 249 Ga. 652, 293 S. E. 2d 334 (1982), cert. denied, 459 U. S. 1156 (1983). The present petition seeks review of a subsequent denial of state habeas corpus relief in state court. Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Georgia insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I nevertheless would, at the very least, delay the disposition of this petition until *California* v. *Brown*, No. 85–1563, is decided.

In closing argument at the sentencing phase of petitioner's trial, the prosecutor incorporated statements from an 1873 decision of the Georgia Supreme Court that appear with some regularity in contemporary capital sentencing proceedings in that State. See *Eberhart* v. *State*, 47 Ga. 598, 609–610; *Ruffin* v. *State*, 243 Ga. 95, 105, 252 S. E. 2d 472, 479–480 (1979). The effect of these statements was to lead the jury to believe that mercy was not a permissible component of their sentencing determination:

> "You took an oath at the beginning of the case. You said, 'I do', to 'You shall well and truly try the issue formed upon this Bill of Indictment . . . and a true verdict give according to evidence. So Help You God.' 'According to evidence'; not according to mercy, not according to sympathy, not according to feeling sorry for a Defendant. . . . Mercy? I submit to you that we should have no sympathy with that sentiment that springs into action whenever a criminal is about to suffer for a

> crime. Society demands that the crime be punished and criminals warned. The false humanity that starts and shudders when the axe of justice is about to fall is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal. . . . A stern, unbending, unflinching administration of justice is the surest way to prevent the commission of other heinous and horrible acts like the one committed by that Defendant. We are a society of Laws, not of sentiment." App. to Pet. for Cert. A–4, pp. 17–18.

On more than one occasion, the Georgia Supreme Court has condemned use of the statements employed by the prosecutor in petitioner's sentencing hearing—at least where they are attributed to a justice of that court—though it has generally found their effect insufficiently prejudicial to warrant reversal of the death sentences imposed. See, *e. g.*, *Ruffin*, *supra*, at 105, 252 S. E. 2d, at 479–480; *Hawes* v. *State*, 240 Ga. 327, 335–336, 240 S. E. 2d 833, 840 (1977). The Court of Appeals for the Eleventh Circuit has rejected use of this same language, regardless of the spokesman, because its content does not relate to the particular circumstances of the defendant whose sentence is being determined, but rather implies that considerations of mercy can have no part in jury deliberations in capital sentencing proceedings. See, *e. g.*, *Wilson* v. *Kemp*, 777 F. 2d 621, 626–628 (1985), cert. denied, 476 U. S. 1153 (1986); *Drake* v. *Kemp*, 762 F. 2d 1449, 1458–1461 (1985), cert. denied, 478 U. S. 1020 (1986). These divergent opinions from the Eleventh Circuit and the Georgia Supreme Court raise serious questions as to the constitutionally permissible scope of prosecutorial comment on the role of mercy in the jury's sentencing decision. Because we granted certiorari in *California* v. *Brown*, *supra*, to decide a closely related issue, I dissent from the present denial of this petition.

No. 85–7087. BOLIEK *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 706 S. W. 2d 847.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Missouri insofar as it left undisturbed the death

sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I nevertheless would grant certiorari because this petition presents an important issue concerning the application of the Confrontation Clause of the Sixth Amendment.

Petitioner William Theodore Boliek, Jr., was charged with the murder of Jody Harless. The State alleged that Boliek shot Harless twice, once in the stomach and once in the head, in order to prevent her from testifying about a robbery in which she had been an accomplice. Boliek admitted that he had fired the first, nonfatal shot, which he claimed was an accident; he contended that the second and fatal shot had been fired by Vernon Wait, another of the participants in the robbery. At petitioner's trial the State produced two witnesses to whom Jody Harless had said, in the days immediately preceding her death, that she was afraid petitioner was going to kill her. In his summation, the prosecutor told the jury: "'Jody Harless, one of her last words was "Ted Boliek's gonna blow my head off." And he did it.'" Pet. for Cert. 5.

The Missouri Supreme Court rejected petitioner's contention that it was reversible error to admit this evidence. *State* v. *Boliek*, 706 S. W. 2d 847 (1986). The Court held the evidence admissible under the hearsay exception for statements of the declarant's present mental condition. *Id.*, at 850. One judge dissented from this holding, taking the position that the statements were not admissible because the victim's state of mind was not material to the State's case. Petitioner contends that the admission of this hearsay violated his rights under the Confrontation Clause.

In *Ohio* v. *Roberts*, 448 U. S. 56 (1980), this Court held that the statement of an unavailable declarant "is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*, at 66. The State contends that the challenged evidence met this standard because the statements were admitted under a recognized hearsay exception. Missouri has not codified its law of evidence, and while it has been said that "[u]nder Missouri law the declarations of the decedent in a homicide case are admissible to prove the decedent's state of mind where that is relevant," *Lenza* v. *Wyrick*, 665 F. 2d 804, 810 (CA8 1981), the Mis-

souri courts have recognized: "[D]eclarations revealing a state of mind often contain recitals of circumstantial facts. They are not admissible to prove the truth of such recitals." *State* v. *Singh*, 586 S. W. 2d 410, 418 (Mo. App. 1979).

There can be no doubt, given the use made of the evidence by the State in summation, that the testimony as to the victim's statements was admitted to prove not her state of mind, but the truth of her belief that petitioner intended to kill her. Cf. Fed. Rule Evid. 803(3) (statements of memory and belief not admissible "to prove the fact remembered or believed"). It is precisely to avoid the possibility of such use of "state of mind" evidence that at least eight States and one Federal Court of Appeals have precluded or sharply limited the introduction of evidence of the victim's state of mind in homicide cases.* Under these circumstances, I do not believe that the evidence in this case was admitted under a "firmly rooted" hearsay exception. See *Ohio* v. *Roberts*, *supra*, at 66. I do not take *Ohio* v. *Roberts* to mean that any hearsay evidence which can be squeezed under the rubric of a state hearsay exception has met the reliability standard required by the Sixth Amendment. See *Dutton* v. *Evans*, 400 U. S. 74, 105 (1970) (MARSHALL, J., dissenting). When evidence nominally received under a particular hearsay exception is presented for purposes other than those the exception was designed to serve, the constitutional analysis should not end with the mere semantic invocation of the rule. The challenged evidence in this case was not accompanied by any independent indicia of reliability. As the dissent below rightly pointed out, it was completely immaterial to the jury's consideration of petitioner's defense of accident. The only function served by the evidence, and one which the prosecutor specifically emphasized in summation, was to raise an impermissible inference for the jury as to premeditation and intent on petitioner's part. Because I believe that the receipt of this evidence under these circumstances creates a serious Confrontation Clause issue, I would grant the petition for certiorari.

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*See, *e. g.*, *People* v. *Huber*, 131 Ill. App. 3d 163, 475 N. E. 2d 599 (1985); *Commonwealth* v. *Bond*, 17 Mass. App. 396, 458 N. E. 2d 1198 (1984); *People* v. *Madson*, 638 P. 2d 18 (Colo. 1981); *Kennedy* v. *State*, 385 So. 2d 1020 (Fla. App. 1980); *State* v. *Wauneka*, 560 P. 2d 1377 (Utah 1977); *State* v. *Goodrich*, 97 Idaho 472, 546 P. 2d 1180 (1976); *People* v. *Ireland*, 70 Cal. 2d 522, 450 P. 2d 580 (1969); *State* v. *Kump*, 76 Wyo. 273, 301 P. 2d 808 (1956). See *United States* v. *Brown*, 160 U. S. App. D. C. 190, 490 F. 2d 758 (1974).

No. 85–7189. WILEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 484 So. 2d 339.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner was sentenced to death by a jury whose sentencing determination was biased impermissibly in favor of death. Because I believe that, under this Court's decisions in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), and *Zant* v. *Stephens*, 462 U. S. 862 (1983), the fact that a murder was committed during the course of a robbery cannot serve *both* as an element of the capital offense and as the factual predicate for *two* statutory aggravating circumstances, I would grant certiorari in this case.

Petitioner William Wiley was convicted of a murder committed during a robbery and was sentenced to death. The Mississippi Supreme Court affirmed the jury's determination of guilt, but remanded for resentencing due to the prosecutor's improper references to appellate review. *Wiley* v. *State*, 449 So. 2d 756 (1984). At the second sentencing proceeding, petitioner once again received a sentence of death. The jury found three statutory aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances. The Mississippi Supreme Court affirmed petitioner's conviction and death sentence, with three justices concurring in the judgment. 484 So. 2d 339 (1986).

Under Mississippi law, all murder is not capital murder. The death sentence may be imposed only where the murder falls into one of seven narrowly defined classes. Miss. Code Ann. §§ 97–3–19(2)(a)–(g) (Supp. 1985). Petitioner was convicted under a section of the statute that classifies murder committed by a person engaged in a robbery as capital murder. § 97–3–19(2)(e). Once the jury found him guilty of the capital offense, it then had to find at least one aggravating circumstance, in order to impose the death penalty. See §§ 99–19–101(5)(a)–(h) (Supp. 1985) (listing aggravating circumstances). In this case, the jury found three statutory aggravating circumstances: "[t]he capital offense was committed while the defendant was engaged . . . in the commission of, or an attempt to commit, any robbery," "[t]he capital offense was committed for pecuniary gain," and "[t]he capital offense was especially heinous, atrocious or cruel." §§ 99–19–101(5)(d), (e), and (h). Two of these circumstances—that the offense was committed while petitioner was engaged in a robbery, and that it was committed for pe-

cuniary gain—would automatically be present in any killing that took place during a robbery.

"Our cases indicate . . . that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." *Zant* v. *Stephens*, *supra*, at 878. Aggravating circumstances provide a "'meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not,'" *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) (quoting *Furman* v. *Georgia*, 408 U. S. 238, 313 (1972) (WHITE, J., concurring)). In *Godfrey* v. *Georgia*, *supra*, this Court struck down an aggravating circumstance so vaguely worded that it failed to perform this narrowing function. In *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), we also rejected mandatory death sentences for specified offenses as constitutionally unacceptable, stating: "'[J]ustice generally requires consideration of more than the particular acts by which the crime was committed . . . .' [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death." *Id.*, at 304 (plurality opinion) (quoting *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937)).

Under Mississippi's sentencing scheme, as applied in this case, all persons convicted of robbery-murder enter the sentencing phase with *two* built-in aggravating circumstances, creating a strong presumption in favor of death. In cases where no mitigating or additional aggravating evidence is introduced, these aggravating circumstances have not narrowed the class of death-eligible persons at all. See *Roberts* v. *Louisiana*, 428 U. S. 325 (1976) (plurality opinion) (mandatory death sentences even for narrowly defined category of murders held unconstitutional). I believe that the use of aggravating factors which repeat an element of the underlying capital offense creates a substantial risk that death will be inflicted in an arbitrary and capricious manner.[1]

[1] A grant of certiorari would enable the Court to resolve a conflict among the Circuits on this issue.

In *Gray* v. *Lucas*, 677 F. 2d 1086, 1105 (1982), cert. denied, 461 U. S. 910 (1983), decided before *Zant* v. *Stephens*, 462 U. S. 862 (1983), the Fifth Cir-

Not only do two of the three aggravating circumstances found by the jury repeat elements of the underlying capital offense, they both rest on the same underlying facts.[2] The Mississippi Supreme Court has not limited the aggravating circumstance of "committed for pecuniary gain" to murder for hire or any other narrow category of murders. Accordingly, any murder committed during the course of a robbery is *ipso facto* committed for pecuniary gain. The Mississippi Supreme Court rejected petitioner's arguments against double counting these aggravating circumstances, over the objection of a concurring justice who stated: "[T]he fallacy of our rule is its failure to recognize that murders are aggravated by a defendant's conduct, not by the statutory language. . . . *A single, legally indivisible act of the defendant may rationally aggravate a murder but once.*" 484 So. 2d, at 358 (Robertson, J., concurring) (emphasis in original).

The State Supreme Court relied on the fact that the jury found, as a third aggravating factor, that the offense was "especially heinous, atrocious or cruel."[3] *Ibid.* Since it needed only one aggravating circumstance to impose death, the state court held that "failure of one repetitious aggravating circumstance does not invalidate the two remaining aggravating factors to reverse the death sen-

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cuit upheld this aspect of the Mississippi sentencing scheme against an equal protection challenge. See also *Adams* v. *Wainwright*, 709 F. 2d 1443, 1447 (CA11 1983) (rejecting similar challenge to Florida statute on the basis of *Proffitt* v. *Florida*, 428 U. S. 242 (1976)), cert. denied, 464 U. S. 1063 (1984). On the other hand, the Eighth Circuit invalidated Arkansas' use of an aggravating circumstance (committed for pecuniary gain) because it repeated an element of the underlying capital offense. *Collins* v. *Lockhart*, 754 F. 2d 258, 263–264, cert. denied, 474 U. S. 1013 (1985).

[2] A number of state courts have invalidated double counting of aggravating circumstances. See, *e. g.*, *Cook* v. *State*, 369 So. 2d 1251, 1256 (Ala. 1979); *Provence* v. *State*, 337 So. 2d 783, 786 (Fla. 1976); *State* v. *Rust*, 197 Neb. 528, 537, 250 N. W. 2d 867, 873, cert. denied, 434 U. S. 912 (1977); *Glidewell* v. *State*, 663 P. 2d 738, 743 (Okla. Crim. App. 1983).

[3] Petitioner also challenges the application of this aggravating circumstance as unconstitutionally vague under *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). Petitioner's crime was similar to that in *Godfrey:* the victim was shot twice from close range, without warning, and died on the scene. 484 So. 2d, at 352–354. Although Mississippi has adopted a limiting construction of this aggravating circumstance, in light of the facts of this case, I "doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in *Godfrey* . . . ." *Eddings* v. *Oklahoma*, 455 U. S. 104, 109, n. 4 (1982).

tence." *Id.*, at 351–352. But under the Mississippi capital sentencing statute, Miss. Code Ann. § 99–19–103 (Supp. 1985), the jury was instructed to balance aggravating against mitigating circumstances. While the jury might have returned a verdict of death even if there had been only one aggravating circumstance, we cannot be sure that it would have done so in view of the mitigating factors presented;[4] the jury's verdict merely stated that "'there are insufficient mitigating factors *to outweigh* the aggravating circumstances.'" 484 So. 2d, at 342 (emphasis supplied). Under the circumstances, I believe that the sentencer's "consideration of . . . improper aggravating circumstance[s] so infects the balancing process created by" the Mississippi statute "that it is constitutionally impermissible . . . to let the sentence stand." *Barclay* v. *Florida*, 463 U. S. 939, 956 (1983) (plurality opinion).[5]

A capital sentencing scheme that repeats an element of the underlying capital offense in two aggravating circumstances cannot properly perform the narrowing function envisioned in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), and *Zant* v. *Stephens*, 462 U. S. 862 (1983). Since petitioner was sentenced under a scheme that suffered from these deficiencies, I would grant the petition for certiorari.[6]

No. 85–7204. MARTIN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN would grant the petition for writ of certiorari limited to Question 1 presented by the petition. Reported below: 770 F. 2d 918 and 781 F. 2d 185.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

[4] The jury was instructed to consider, among other factors, petitioner's lack of a prior criminal record. 484 So. 2d, at 350.

[5] In *Collins* v. *Lockhart*, *supra*, at 258–259, the Eighth Circuit invalidated an Arkansas death sentence after eliminating one of three aggravating circumstances found by the jury, since the jury had balanced aggravating and mitigating factors. The Court of Appeals distinguished the Arkansas sentencing statute from statutes that give the jury absolute discretion to impose death once it finds a single aggravating circumstance. But cf. *Zant* v. *Stephens*, *supra*, at 890.

[6] In addition, petitioner raises issues related to those that will be before the Court this Term in *California* v. *Brown*, No. 85–1563. I would at the very least delay disposition of this petition until that case is decided.

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 86-67. RATH PACKING COMPANY CREDITORS' TRUST *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 787 F. 2d 318.

No. 86-268. SCHOLES *v.* ALLRED ET AL. Ct. App. Cal., 1st App. Dist. Petition for writ of certiorari and/or prohibition denied.

No. 86-272. MEDICAL INC. *v.* REGENTS OF THE UNIVERSITY OF MINNESOTA. Ct. App. Minn. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 382 N. W. 2d 201.

No. 86-5098. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 778 F. 2d 933.

JUSTICE WHITE, dissenting.

In *Chimel* v. *California*, 395 U. S. 752 (1969), the Court held that the valid arrest of a person in a residence does not give the police an automatic right to search the remainder of the house without a warrant. Some Courts of Appeals permit a warrantless "protective sweep" of the remainder of the premises if the arresting officers reasonably believe that there are other persons on the premises who could pose a danger to the officers' safety. See *United States* v. *Hatcher*, 680 F. 2d 438, 444 (CA6 1982); *United States* v. *Kolodziej*, 706 F. 2d 590, 596-597 (CA5 1983). Other Courts of Appeals, including the Court of Appeals for the Second Circuit in this case, permit protective sweeps if there is a likelihood that another person may be on the premises who may destroy evidence. See also *United States* v. *Vasquez*, 638 F. 2d 507 (CA2 1980), cert. denied, 454 U. S. 975 (1981). Almost all of the Courts of Appeals have struggled to define the circumstances under which such searches are permissible. See *United States* v. *Gardner*, 627 F. 2d 906, 910, n. 3 (CA9 1980).

The Court of Appeals for the Second Circuit in this case expressly recognized that its approach, allowing a protective sweep when the police only suspect that another person on the premises

may destroy evidence, conflicted with the more stringent safety-based approach adopted by other Courts of Appeals. 778 F. 2d 933, 937 (1985). In light of these differing approaches and in light of the decision in *Chimel* v. *California*, see *Vasquez* v. *United States*, 454 U. S., at 987 (BRENNAN, J., dissenting from denial of certiorari), certiorari should be granted to deal with this important and recurring issue of Fourth Amendment law.

No. 86-5291. ARABI ET AL. *v.* PENNSYLVANIA ET AL. Sup. Ct. Pa. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 509 Pa. 164, 501 A. 2d 617.

Rehearing Denied

No. 71-288. LAIRD, FORMER SECRETARY OF DEFENSE, ET AL. *v.* TATUM ET AL., 408 U. S. 1 and 409 U. S. 901. Motion for leave to file second petition for rehearing denied.

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Appeals Dismissed

No. 85-7068. BARNES *v.* DEPARTMENT OF REVENUE, DIVISION OF MOTOR VEHICLES. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 238 Kan. 820, 714 P. 2d 975.

No. 86-306. GREEN ET UX. *v.* DEPARTMENT OF HUMAN SERVICES OF WEST VIRGINIA. Appeal from Cir. Ct. W. Va., Jefferson County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. A-195. MIKUTAITIS *v.* UNITED STATES ET AL. C. A. 7th Cir. Application for stay, presented to JUSTICE STEVENS, and by him referred to the Court, denied. The stay heretofore entered by JUSTICE STEVENS [478 U. S. 1306] is vacated.

No. A-296. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* DARDEN. Application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE POWELL, and by him referred to the Court, denied.

No. D–559. IN RE DISBARMENT OF BURKE. Disbarment entered. [For earlier order herein, see 478 U. S. 1018.]

No. D–560. IN RE DISBARMENT OF HEYSER. Disbarment entered. [For earlier order herein, see 478 U. S. 1018.]

No. D–578. IN RE DISBARMENT OF ALKER. It is ordered that Edward C. Alker, of Folsom, La., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–579. IN RE DISBARMENT OF BETZ. It is ordered that David Franklin Betz, of Ludington, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–580. IN RE DISBARMENT OF SISK. It is ordered that Mary Neal Sisk, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. 85–937. WEST VIRGINIA *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, 475 U. S. 1009.] Motion of California for leave to file a brief as *amicus curiae* out of time denied.

No. 85–1129. JOHNSON *v.* TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. [Certiorari granted, 478 U. S. 1019.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* out of time granted.

No. 85–6790. GRANBERRY *v.* GREER, WARDEN. C. A. 7th Cir. [Certiorari granted, *ante*, p. 813.] Motion for appointment of counsel granted, and it is ordered that Howard B. Eisenberg, Esquire, of Carbondale, Ill., be appointed to serve as counsel for petitioner in this case.

No. 86–5430. BENVENUTI *v.* DEPARTMENT OF DEFENSE ET AL. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 10, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86-5550. IN RE DIXON. Petition for writ of habeas corpus denied.

No. 86-5451. IN RE THAPER. Petition for writ of mandamus denied.

No. 86-356. IN RE TRACEY. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 86-133. NOLLAN ET UX. *v.* CALIFORNIA COASTAL COMMISSION. Appeal from Ct. App. Cal., 2d App. Dist. Probable jurisdiction noted. Reported below: 177 Cal. App. 3d 719, 223 Cal. Rptr. 28.

Certiorari Granted

No. 85-2068. RANKIN ET AL. *v.* MCPHERSON. C. A. 5th Cir. Certiorari granted. Reported below: 786 F. 2d 1233.

No. 86-270. SAN FRANCISCO ARTS & ATHLETICS, INC., ET AL. *v.* UNITED STATES OLYMPIC COMMITTEE ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 781 F. 2d 733 and 789 F. 2d 1319.

No. 86-337. BURLINGTON NORTHERN RAILROAD CO. *v.* OKLAHOMA TAX COMMISSION ET AL. C. A. 10th Cir. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari granted.

Certiorari Denied. (See also No. 86-306, *supra*.)

No. 85-6918. HOOKS ET AL. *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 1433.

No. 85-7161. BRADLEY *v.* MASSEY, SUPERINTENDENT, UNION CORRECTIONAL INSTITUTION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 1568.

No. 85–7169. OLIVER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 782 F. 2d 1521.

No. 85–7183. AMAZON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 487 So. 2d 8.

No. 86–23. GARVIN ET AL. *v.* ALUMAX OF SOUTH CAROLINA, INC. C. A. 4th Cir. Certiorari denied. Reported below: 787 F. 2d 910.

No. 86–45. EPPINGA *v.* EDGAR, SECRETARY OF STATE OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 112 Ill. 2d 101, 492 N. E. 2d 187.

No. 86–103. ARLINGTON HOTEL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 785 F. 2d 249.

No. 86–113. AMERICAN BAPTIST CHURCHES IN THE U. S. A. ET AL. *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 194.

No. 86–114. JOHNSON, AN INFANT, BY JOHNSON, HER MOTHER AND NATURAL GUARDIAN, ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 845.

No. 86–117. SACHDEV *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 912.

No. 86–120. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* ELLENDER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 1127.

No. 86–144. CARSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 793 F. 2d 1141.

No. 86–190. TURZAI *v.* PENNSYLVANIA LIQUOR CONTROL BOARD. Pa. Commw. Ct. Certiorari denied. Reported below: 90 Pa. Commw. 374, 495 A. 2d 639.

No. 86–222. BATTERTON ET AL. *v.* TEXAS GENERAL LAND OFFICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1220.

No. 86-264. ALFARONE ET AL. *v.* BERNIE WOLFF CONSTRUCTION CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 76.

No. 86-296. BALKO ET AL. *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 86-300. FROST *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 386.

No. 86-307. CITY OF PADUCAH ET AL. *v.* INVESTMENT ENTERTAINMENT, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 463.

No. 86-313. GONZALEZ *v.* PUBLIC HEALTH TRUST, AKA JACKSON MEMORIAL HOSPITAL. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 170.

No. 86-318. BAILEY *v.* FEDERAL INTERMEDIATE CREDIT BANK OF ST. LOUIS. C. A. 8th Cir. Certiorari denied. Reported below: 788 F. 2d 498.

No. 86-332. MOONEY, DBA BETHEL STEEL CO., ET AL. *v.* GREATER NEW CASTLE DEVELOPMENT CORP. Sup. Ct. Pa. Certiorari denied. Reported below: 510 Pa. 516, 510 A. 2d 344.

No. 86-335. BAUMGARTNER, EXECUTOR OF THE ESTATE OF BAUMGARTNER *v.* FIRST CHURCH OF CHRIST, SCIENTIST, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 141 Ill. App. 3d 898, 490 N. E. 2d 1319.

No. 86-338. BERRY ET AL. *v.* AETNA CASUALTY & SURETY CO. C. A. 5th Cir. Certiorari denied. Reported below: 787 F. 2d 586.

No. 86-339. NATIONAL GYPSUM CO. ET AL. *v.* SCHOOL DISTRICT OF LANCASTER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 789 F. 2d 996.

No. 86-343. YOUNG ET AL. *v.* SEABOARD SYSTEM RAILROAD CO. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 1161.

No. 86-348. ASSIGNED CONTAINER SHIP CLAIMS, INC. *v.* AMERICAN PRESIDENT LINES, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 1420.

No. 86-349. KUNTZ ET AL. *v.* REESE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 1410.

No. 86-355. PORZIG ET AL. *v.* NOLDEN. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 938.

No. 86-360. FIRST TRUST & SAVINGS BANK OF KANKAKEE ET AL. *v.* COMMONWEALTH EDISON CO. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 141 Ill. App. 3d 668, 490 N. E. 2d 255.

No. 86-395. HRONOPOULOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 1567.

No. 86-402. JOHNSON *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 933.

No. 86-412. COPLEY PRESS, INC., ET AL. *v.* SMITH. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 140 Ill. App. 3d 613, 488 N. E. 2d 1032.

No. 86-414. ST. CYPRIAN'S CHAPEL, INC. *v.* FRATERNITY OF THE APOSTLES OF JESUS AND MARY. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1138.

No. 86-418. BRAKKE ET AL. *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1014.

No. 86-423. PORCARO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 784 F. 2d 38.

No. 86-427. BUTLER *v.* DEPARTMENT OF AGRICULTURE. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1018.

No. 86-438. ROBERTS *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1014.

No. 86-455. MASY ET AL. *v.* NEW JERSEY TRANSIT RAIL OPERATIONS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 790 F. 2d 322.

No. 86-458. PARR ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 1288.

No. 86-5183. SHAFFER *v.* STEWART ET AL. C. A. 2d Cir. Certiorari denied.

No. 86-5226. MARKS *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 86-5236. FIXEL *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA ET AL. C. A. 9th Cir. Certiorari denied.

No. 86-5367. AQUI ET AL. *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 104 N. M. 345, 721 P. 2d 771.

No. 86-5371. KAY *v.* OAKLAND, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1122.

No. 86-5376. RORRER *v.* BULLOCK, DISTRICT COURT JUDGE IN WAKE COUNTY, NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 86-5380. DULCE *v.* GOLDSTEIN ET UX. C. A. 2d Cir. Certiorari denied.

No. 86-5408. BRENNAN *v.* GRAHAM, GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 794 F. 2d 686.

No. 86-5424. PAREZ *v.* HOGAN ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 86-5435. BARKSDALE *v.* THOMPSON, GOVERNOR OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 86-5450. PAVELSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 789 F. 2d 485.

No. 86-5464. DAY *v.* CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1122.

No. 86-5468. MARTIN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 20 M. J. 227.

No. 86-5471. GILLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 683.

No. 86-5513. IN RE LUCAS. Sup. Ct. Ohio. Certiorari denied.

No. 86–5520. ROSENTHAL *v.* ROSENTHAL. Ct. App. Wis. Certiorari denied.

No. 85–2034. KRAMER *v.* HORTON ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 128 Wis. 2d 404, 383 N. W. 2d 54.

JUSTICE WHITE, dissenting.

This case presents the issue whether exhaustion of state administrative remedies is a prerequisite to bringing an action in state court under 42 U. S. C. § 1983. In this case, the Wisconsin Supreme Court held that state administrative remedies must be exhausted before bringing an action under § 1983 in Wisconsin state courts. 128 Wis. 2d 404, 383 N. W. 2d 54 (1986). For the reasons stated in my previous dissent from denial of certiorari in *Caylor* v. *Red Bluff*, 474 U. S. 1037 (1985), I would grant certiorari.

No. 85–2115. WHITTAKER CORP. *v.* JENKINS. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 720.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

The respondents in this case first moved for prejudgment interest 30 days after the entry of judgment in their favor. The District Court treated the motion as one to alter or amend the judgment, and denied it as untimely because it was not filed within 10 days of the entry of judgment. See Fed. Rule Civ. Proc. 59(e). The United States Court of Appeals for the Ninth Circuit reversed, holding that a motion for prejudgment interest made for the first time after entry of judgment is not a Rule 59(e) motion but a general motion governed by Federal Rule of Civil Procedure 7. 785 F. 2d 720, 723 (1986). This holding conflicts with *Goodman* v. *Heublein, Inc.*, 682 F. 2d 44, 45–47 (CA2 1982). I would grant certiorari to resolve this conflict.

No. 85–6956. ALDRICH *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 630.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth

and Fourteenth Amendments, I would vacate the judgment of the Court of Appeals for the Eleventh Circuit insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I nevertheless would grant certiorari because petitioner was denied effective assistance of counsel at his trial in violation of the Sixth and Fourteenth Amendments.

I

Petitioner Levis Leon Aldrich was charged with the murder of Robert Ward, the night manager at a restaurant where Aldrich had at one time been employed. Ward's body was discovered at 12:19 a.m. on September 3, 1974, by sheriff's deputies responding to the restaurant's burglar alarm. Ward had been shot in the head. The restaurant's safe had been emptied of the evening's receipts, estimated by the owner at between $600 and $900. At roughly 2 a.m., police stopped petitioner, who was driving his car slowly by the restaurant. Petitioner was carrying more than $500 in cash. At their request, petitioner took the police officers to the hotel room in which he had been staying since his release from prison the week before. There he showed the officers his receipt for $558.58 paid to him by the Department of Corrections at the time of his release.

The shotgun which had killed Ward was later discovered by the police, broken apart, in two ditches in the surrounding neighborhood. No physical evidence at the crime scene or on the shotgun linked petitioner to the killing. However, after further investigation, petitioner was arrested and indicted.

Aldrich was represented by appointed counsel from the Public Defender's office. The only member of that office who conducted any investigation or undertook any preparation for the trial until two weeks before the trial date was a legal intern in the office, who during the relevant period was not yet a member of the bar. Trial counsel did not exercise the right, under Florida law, to depose any of the State's 41 prospective witnesses. No one from the Public Defender's office examined any of the State's physical exhibits. Of the seven prospective witnesses identified by the defense before trial, petitioner's counsel had interviewed only two. Pet. for Cert. 12.

Four days before the opening of trial, petitioner's counsel moved for a continuance. The motion was heard on the scheduled trial date, at which time defense counsel told the court: "This case is not prepared. We are not in a position to provide competent legal representation." *Id.*, at 11. The trial court denied the motion and insisted that the trial begin immediately. Petitioner's trial counsel, who was fully experienced in the trial of capital cases, testified in the state postconviction hearing that he had never been as unprepared to try even a misdemeanor case as he was for petitioner's capital murder trial. *Ibid.*

The State's case hinged upon the testimony of Charles Strickland. Strickland owned the shotgun which had killed Ward; he told police that he had lent it to petitioner on the evening of the murder. Strickland claimed that petitioner called him the next day and told him that he had used the gun in a robbery and had killed a man. According to Strickland, petitioner asked him to help recover the gun from a parking lot near the scene of the murder. Strickland testified that he did so, after which he cleaned the gun, broke it down, and threw the parts into separate ditches. Although Strickland initially told police that he had lost the gun, he later changed his mind and led police to the evidence. James Norman Sapp, who along with Strickland had met petitioner in prison, testified that while in prison petitioner had told Sapp that he intended to rob the restaurant when released.

The sole defense witness was petitioner himself, who denied any involvement in the crime. He testified that he had been fishing until 10:30 or 11 p.m. on the night of the murder, and had then gone to a bar until 1:30 or 2 a.m. After leaving the bar, petitioner testified, he drove out to meet a woman who had a room to rent. On the way to her house, he passed the restaurant, and was stopped by the police.

The jury found petitioner guilty of capital murder. At petitioner's express request, counsel presented no evidence in mitigation of sentence. The jury returned an advisory verdict in favor of the death sentence, which the trial court then imposed. The Florida Supreme Court affirmed petitioner's conviction and death sentence. *Aldridge* v. *State*, 351 So. 2d 942 (1977).* Postconviction relief was denied. *Aldridge* v. *State*, 425 So. 2d 1132

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*Petitioner's last name was apparently misspelled as "Aldridge" in the state-court proceedings.

(1982), cert. denied, 461 U. S. 939 (1983). In his first federal habeas petition, Aldrich claimed that he had been denied effective assistance of counsel at his trial. The District Court denied relief, and the Court of Appeals affirmed. 777 F. 2d 630 (CA11 1985).

II

The District Court found, and the Court of Appeals agreed, that petitioner's trial counsel was so handicapped by absence of preparation that he could not meet the objective standard of reasonably effective assistance of counsel required by this Court in *Strickland* v. *Washington*, 466 U. S. 668 (1984). The Court of Appeals held, however, that petitioner had failed to show that he was prejudiced by the inadequacy of his counsel, as required by *Strickland*, *supra*. The Court of Appeals found that further investigation before trial would not have disclosed helpful evidence: "On cross-examination at the post-conviction hearing, [counsel] who represented Aldrich at trial were unable to point to any fact learned at trial, or later, that might have been discovered by deposition." 777 F. 2d, at 637. In response to the statement of counsel that investigation would have shown that Strickland and Sapp had a motive to commit the robbery, and additionally had reasons to throw suspicion on petitioner, the Court of Appeals found this "insufficient to [create] 'a reasonable probability' of reasonable doubt respecting guilt." *Id.*, at 636.

III

I continue to believe that "a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby." *Strickland*, 466 U. S., at 712 (MARSHALL, J., dissenting). Even under the prejudice standard, however, the facts disclosed by the record demonstrate that petitioner is entitled to relief. As the Court recognized in fashioning the prejudice standard, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.*, at 696. The dissent in the Court of Appeals correctly characterized this case:

> "Petitioner was convicted on the basis of evidence that was far from strong. No physical evidence implicating Aldrich was

recovered at the scene of the killing. While in custody, Aldrich made no statements resembling a confession. The only direct evidence implicating Aldrich was testimony from a convicted felon who had violated the terms of his parole and lied to police investigators, and who was the other most likely suspect in the crime." 777 F. 2d, at 642 (Johnson, J., dissenting).

Petitioner's life rested on the outcome of the jury's estimation of the relative credibility of petitioner and Charles Strickland. Yet because of the absence of preparation time, petitioner's counsel had not interviewed the witnesses whose testimony might bear on the credibility of Strickland's story. Even more importantly, counsel had not exercised his state-law right to take Strickland's deposition. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, *supra*, at 686. In a case as closely balanced as this one, I believe we can have no confidence in the result where counsel's inadequate preparation precluded the vigorous testing of the evidence upon which the State proposed to forfeit a man's life.

I would grant the petition for certiorari.

No. 85-7013. STRINGER *v.* MISSISSIPPI. Sup. Ct. Miss.;

No. 86-5192. EVANS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;

No. 86-5297. JEFFERSON *v.* ALABAMA. Sup. Ct. Ala.;

No. 86-5362. NUCKOLS *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla.;

No. 86-5369. JEFFRIES *v.* WASHINGTON. Sup. Ct. Wash.;

No. 86-5381. HOGUE *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 86-5452. DRISCOLL *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 85-7013, 485 So. 2d 274; No. 86-5192, 790 F. 2d 1232; No. 86-5297, 473 So. 2d 1110; No. 86-5369, 105 Wash. 2d 398, 717 P. 2d 722; No. 86-5381, 711 S. W. 2d 9; No. 86-5452, 711 S. W. 2d 512.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 86–84. NATIONAL BANCARD CORP. *v.* VISA U. S. A., INC. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 779 F. 2d 592.

No. 86–85. RISKEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 788 F. 2d 1361.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

This case presents the issue whether 18 U. S. C. § 1503 prohibits witness tampering. In this case, the Court of Appeals for the Eighth Circuit held that witness tampering is punishable under this provision. 788 F. 2d 1361 (1986). For the reasons stated in my previous dissent from denial of certiorari in *Cooper* v. *United States* and *Wesley* v. *United States*, 471 U. S. 1130 (1985), and consistent with my dissent from denial of certiorari in *Rovetuso* v. *United States*, 474 U. S. 1076 (1986), I would grant certiorari.

No. 86–90. SAN LUIS OBISPO MOTHERS FOR PEACE ET AL. *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 252 U. S. App. D. C. 194, 789 F. 2d 26.

No. 86–158. COUNTY OF WAYNE ET AL. *v.* CARROLL. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 44.

JUSTICE WHITE, dissenting.

This case presents the question of which state statute of limitations should be applied in a case brought under 42 U. S. C. § 1983 when more than one state statute arguably can be characterized as addressing "personal injury" claims. See *Wilson* v. *Garcia*, 471 U. S. 261 (1985). The lower courts continue to struggle with this question. In this case, for example, the Court of Appeals for the Sixth Circuit, 754 F. 2d 662 (1985), concluded that a 3-year, catchall statute should be applied which covers actions brought "to recover damages for the death of a person, or for injury to a person or property." Mich. Comp. Laws § 600.5805(8) (1979). The Sixth Circuit chose this section over other 2-year sections which specifically cover intentional torts. See, *e. g.*, Mich. Comp. Laws § 600.5805(2) (1979) ("The period of limitations is 2 years for an

action charging assault, battery, or false imprisonment.") In so deciding, the Sixth Circuit has taken an approach directly contrary to its earlier decision in *Mulligan* v. *Hazard*, 777 F. 2d 340, 344 (1985), cert. denied, 476 U. S. 1174 (1986).

I dissented from the denial of certiorari in *Mulligan* because of the split among the Courts of Appeals in dealing with this question, and I dissent here because the confusion evidenced by this split is underscored by the Sixth Circuit's change in approach.

No. 86–172 (A–18). ARANETA ET UX. *v.* UNITED STATES. C. A. 4th Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. The stay heretofore entered by Chief Justice Burger [478 U. S. 1301] is vacated. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 794 F. 2d 920.

No. 86–278. JENSEN *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for accounting denied. Certiorari denied. Reported below: 796 F. 2d 473.

No. 86–310. WARDEN ET AL. *v.* NOLAN, JUDGE, CIRCUIT COURT OF DUPAGE COUNTY, ILLINOIS. Sup. Ct. Ill. Certiorari denied. JUSTICE BRENNAN would grant certiorari.

No. 86–312. WIGGINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 253 U. S. App. D. C. 8, 791 F. 2d 179.

No. 86–329. GARDINER ET AL. *v.* SEA-LAND SERVICE, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 786 F. 2d 943.

Rehearing Denied

No. 85–890. HUBBY *v.* HISTORIC SAVANNAH FOUNDATION ET AL., 475 U. S. 1108. Petition for rehearing denied.

OCTOBER 22, 1986

Miscellaneous Order

No. A–290 (86–604). TOWNLEY ET AL. *v.* CLARK. C. A. 4th Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

OCTOBER 30, 1986

Dismissal Under Rule 53

No. 86-548. REMUS ET AL. *v.* AMOCO OIL CO. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 794 F. 2d 1238.

NOVEMBER 3, 1986

Affirmed on Appeal

No. 86-369. BABBITT, GOVERNOR OF ARIZONA, ET AL. *v.* PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA ET AL. Affirmed on appeal from C. A. 9th Cir. THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA would note probable jurisdiction and set the case for oral argument. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 789 F. 2d 1348.

Appeals Dismissed

No. 85-7217. GIBSON *v.* MICHIGAN DEPARTMENT OF SOCIAL SERVICES. Appeal from Ct. App. Mich. dismissed for want of substantial federal question.

No. 86-261. GARFIELD TRUST CO. *v.* DIRECTOR, DIVISION OF TAXATION OF NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 102 N. J. 420, 508 A. 2d 1104.

No. 86-263. MIYAMOTO *v.* OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF HAWAII. Appeal from Sup. Ct. Haw. dismissed for want of substantial federal question.

No. 86-308. NUNEZ *v.* WAINOCO OIL & GAS CO. ET AL. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 488 So. 2d 955.

No. 86-5501. MCLEOD *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 477 So. 2d 5.

No. 86-5509. WOODS *v.* KEEBLER CO. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers

whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 794 F. 2d 686.

No. 86–378. PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA ET AL. *v.* BABBITT, GOVERNOR OF ARIZONA, ET AL. Cross-appeal from C. A. 9th Cir. dismissed. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 789 F. 2d 1348.

Certiorari Granted—Reversed and Remanded. (See No. 85–1388, *ante*, p. 1.)

Miscellaneous Orders

No. — — ——. PARRO ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. Motion of petitioners to dispense with printing portions of the appendix to the petition for writ of certiorari granted.

No. A–271. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* WOLLERSHEIM. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, is granted and the order entered by JUSTICE O'CONNOR on October 8, 1986, is continued pending the timely filing and disposition of a petition for writ of certiorari. JUSTICE BRENNAN took no part in the consideration or decision of this order.

No. A–307. KOCZAK ET AL. *v.* DIXON ET AL. C. A. 3d Cir. Application for stay and other relief, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–581. IN RE DISBARMENT OF HYBSHA. It is ordered that Adolph Allison Hybsha, of Wichita, Kan., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–582. IN RE DISBARMENT OF GOODSTEIN. It is ordered that Harold Goodstein, of Commack, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–583. IN RE DISBARMENT OF GONZALES. It is ordered that Alphonse C. Gonzales, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–584. IN RE DISBARMENT OF FAWELL. It is ordered that Michael K. Fawell, of Wheaton, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–585. IN RE DISBARMENT OF REYNOLDS. It is ordered that John Francis Reynolds, of Oak Brook, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–586. IN RE DISBARMENT OF SELIGMAN. It is ordered that Stanley L. Seligman, of Hollywood, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–587. IN RE DISBARMENT OF LITTERER. It is ordered that George E. Litterer, of Media, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85–558. O'CONNOR ET UX. *v.* UNITED STATES;

No. 85–559. COPLIN ET UX. *v.* UNITED STATES; and

No. 85–560. MATTOX ET UX. *v.* UNITED STATES. C. A. Fed. Cir. [Certiorari granted, 474 U. S. 1050.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 85–608. ILLINOIS *v.* KRULL ET AL. Sup. Ct. Ill. [Certiorari granted, 475 U. S. 1080.] Motion of petitioner for leave to file reply brief out of time granted.

No. 85–1277. SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL. *v.* ARLINE. C. A. 11th Cir. [Certiorari granted, 475 U. S. 1118.] Motion of respondent for divided argument to permit American Public Health Association to argue as *amicus curiae* denied.

No. 85–1708. CALIFORNIA ET AL. *v.* CABAZON BAND OF MISSION INDIANS ET AL. C. A. 9th Cir. [Probable jurisdiction post-

poned, 476 U. S. 1168.] Motion of appellees for divided argument denied. JUSTICE BLACKMUN would grant the motion.

No. 85–2039. UNITED STATES *v.* JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHNSON. C. A. 11th Cir. [Certiorari granted, *ante*, p. 811.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85–2067. UNITED STATES *v.* MENDOZA-LOPEZ ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 811.] Motion of the Solicitor General to dispense with printing the joint appendix granted. Motion of respondents for leave to proceed further herein *in forma pauperis* granted.

No. 85–2099. PENNSYLVANIA *v.* FINLEY. Super. Ct. Pa. [Certiorari granted, *ante*, p. 812.] Motion for appointment of counsel granted, and it is ordered that Catherine M. Harper, of Lansdale, Pa., be appointed to serve as counsel for respondent in this case.

No. 85–5221. GRIFFITH *v.* KENTUCKY. Sup. Ct. Ky. [Certiorari granted, 476 U. S. 1157.] Motion for appointment of counsel granted, and it is ordered that J. Vincent Aprile II, Esquire, of Frankfort, Ky., be appointed to serve as counsel for petitioner in this case.

No. 86–5479. WRENN *v.* OHIO DEPARTMENT OF MENTAL HEALTH. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 24, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86–5678. HILL *v.* CITY OF HOUSTON, TEXAS. C. A. 5th Cir. Motion of appellant to expedite consideration of the cross-appeal granted.

No. 86–5414. IN RE MAGOON;
No. 86–5448. IN RE PARRISH; and

No. 86–5481. IN RE CURREY. Petitions for writs of mandamus denied.

No. 86–5442. IN RE BARONOWSKI; and
No. 86–5496. IN RE PASKALIK. Petitions for writs of prohibition denied.

Probable Jurisdiction Postponed

No. 86–179. CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ET AL. *v.* AMOS ET AL.; and
No. 86–401. UNITED STATES *v.* AMOS ET AL. Appeals from D. C Utah. Further consideration of question of jurisdiction postponed to hearing of cases on the merits, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 594 F. Supp. 791 and 618 F. Supp. 1013.

No. 86–421. BOARD OF DIRECTORS OF ROTARY INTERNATIONAL ET AL. *v.* ROTARY CLUB OF DUARTE ET AL. Appeal from Ct. App. Cal., 2d App. Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits. JUSTICE BLACKMUN and JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213.

Certiorari Granted

No. 86–88. CITICORP INDUSTRIAL CREDIT, INC. *v.* BROCK, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari granted. Reported below: 788 F. 2d 1200.

No. 86–177. TANNER ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted. Reported below: 772 F. 2d 765.

No. 86–87. UNITED STATES *v.* SALERNO ET AL. C. A. 2d Cir. Certiorari granted. Motion of the Solicitor General to expedite is granted. The Solicitor General's opening brief is due November 18, 1986. Respondent's brief is due December 18, 1986. Case is set for oral argument during the January Session. Reported below: 794 F. 2d 64.

No. 86–5375. BURGER *v.* KEMP, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 785 F. 2d 890 and 796 F. 2d 1313.

Certiorari Denied. (See also Nos. 86–308, 86–5501, and 86–5509, *supra.*)

No. 85–2015. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* HARCON BARGE CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 665.

No. 85–2019. REARDON, SHERIFF OF ESSEX COUNTY *v.* COLA. C. A. 1st Cir. Certiorari denied. Reported below: 787 F. 2d 681.

No. 85–7078. AMMONS ET AL. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 105 Wash. 2d 175, 713 P. 2d 719.

No. 85–7154. BAHRAMNIA *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 1243.

No. 85–7162. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 487 So. 2d 1073.

No. 85–7188. NEYLAND *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 785 F. 2d 1283.

No. 85–7198. MCSWAIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 787 F. 2d 586.

No. 85–7221. GARY *v.* WILKES, SHERIFF, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86–78. ROBERTS, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERTS *v.* SPALDING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 867.

No. 86–137. AMEND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 791 F. 2d 1120.

No. 86–163. BRIGGINS *v.* POLICE DEPARTMENT OF THE CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 965, 494 N. E. 2d 90.

No. 86–180. KREBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 788 F. 2d 1166.

No. 86–189. METZ ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 1528.

No. 86–212. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 793 F. 2d 246.

No. 86–227. RIDLEY *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 351.

No. 86–252. ALOHA AIRLINES, INC. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO. C. A. 9th Cir. Certiorari denied. Reported below: 790 F. 2d 727.

No. 86–256. DOE *v.* A CORPORATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 759.

No. 86–289. EALEY, PERSONAL REPRESENTATIVE OF EALEY, ET AL. *v.* CITY OF DETROIT ET AL. Ct. App. Mich. Certiorari denied. Reported below: 144 Mich. App. 324, 375 N. W. 2d 435.

No. 86–342. MANDHARE *v.* W. S. LAFARGUE ELEMENTARY SCHOOL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 1563.

No. 86–368. RAFFAELLI *v.* BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF JUSTICE, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 1295.

No. 86–371. IRVIN ET AL. *v.* RABUN COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 794 F. 2d 685.

No. 86–373. FLANAGAN ET AL. *v.* PRUDENTIAL-BACHE SECURITIES, INC. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 500, 495 N. E. 2d 345.

No. 86–374. FLORIDA *v.* SCOTT. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 481 So. 2d 40.

No. 86–385. DAIG CORP. *v.* MEDTRONIC, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 789 F. 2d 903.

No. 86–387. HOWARD ELECTRICAL & MECHANICAL, INC. *v.* BAKER INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 794 F. 2d 965.

No. 86–392. GORDON ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 29.

No. 86–394. CITIZENS FOR DECENCY THROUGH LAW, INC. *v.* OAK INDUSTRIES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 1566.

No. 86–400. TRAILWAYS, INC., JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL–CIO, CLC *v.* TRAILWAYS LINES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 785 F. 2d 101.

No. 86–403. CRIBBS ET AL. *v.* HILL ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 489 So. 2d 524.

No. 86–406. KEYSTONE CONSOLIDATED INDUSTRIES, INC. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 810.

No. 86–408. MASSOUD *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 86–410. FRINT ET AL. *v.* TEXACO INC. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 170.

No. 86–425. OBIAYA *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1017.

No. 86–426. MADDOX ET AL. *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 502 So. 2d 786.

No. 86–436. JONES *v.* NIAGARA FRONTIER TRANSPORTATION AUTHORITY ET AL.; and JONES *v.* SIEGFRIED CONSTRUCTION CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 136 (second case).

No. 86–446. FLYNT DISTRIBUTING CO., INC. *v.* LERMAN. C. A. 2d Cir. Certiorari denied. Reported below: 789 F. 2d 164.

No. 86–466. CORCORAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 67 Md. App. 252, 507 A. 2d 200.

No. 86–470. SEATTLE TOTEMS HOCKEY CLUB, INC., ET AL. *v.* NATIONAL HOCKEY LEAGUE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1347.

No. 86–474. CLISSURAS *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 86–477. SCHURMAN ET AL. *v.* UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1019.

No. 86–479. CORY *v.* UNIROYAL, INC. C. A. 4th Cir. Certiorari denied. Reported below: 790 F. 2d 888.

No. 86–500. LEONARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 460.

No. 86–504. MISSICK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 795 F. 2d 87.

No. 86–506. WILLIAMS *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 68 Haw. 498, 720 P. 2d 1010.

No. 86–514. SILVERSTEIN *v.* BARNES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 798 F. 2d 467.

No. 86–527. FERGUSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 828.

No. 86–538. HOCKERSMITH *v.* PARTNER PUBLISHING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 790 F. 2d 892.

No. 86–551. WRIGHT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 513 A. 2d 804.

No. 86–582. WAITES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 792 F. 2d 1528.

No. 86–5124. BROWNSCOMBE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 66 Md. App. 801.

No. 86–5154. ROBERTS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 790 F. 2d 87.

No. 86–5182. VEATCH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 792 F. 2d 48.

No. 86–5188. TURNER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 713 S. W. 2d 327.

No. 86-5202. BUTLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1054.

No. 86-5243. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 786.

No. 86-5245. ROBERTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 792 F. 2d 140.

No. 86-5272. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 145.

No. 86-5386. WHITE *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 1568.

No. 86-5390. MILLER *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 937.

No. 86-5392. BARTLETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 1285.

No. 86-5396. MASON *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 86-5397. HILL *v.* PERINI, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 788 F. 2d 406.

No. 86-5403. ADELMAN *v.* CARLSON ET AL. C. A. 5th Cir. Certiorari denied.

No. 86-5404. CRUSOS *v.* UNITED TRANSPORTATION UNION, LOCAL 1201, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 970.

No. 86-5405. LAGRANGE *v.* JONES, JUDGE. C. A. 5th Cir. Certiorari denied.

No. 86-5407. MCCLOUD *v.* LOVALLEY ET AL. C. A. 2d Cir. Certiorari denied.

No. 86-5410. SINGLETON *v.* FREY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 793 F. 2d 212.

No. 86-5411. WHITE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 111 Ill. 2d 595.

No. 86-5412. GRUBOWSKI *v.* GRUBOWSKI. Ct. Sp. App. Md. Certiorari denied. Reported below: 64 Md. App. 712.

No. 86-5413. D'ZESATI *v.* CALIFORNIA STATE UNIVERSITY, SACRAMENTO, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 937.

No. 86-5415. SPALLA *v.* FOLTZ, ADMINISTRATOR, MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied. Reported below: 788 F. 2d 400.

No. 86-5421. DIXSON *v.* QUARLES, SUPERINTENDENT, HURON VALLEY WOMEN'S FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 781 F. 2d 534.

No. 86-5422. SMITH *v.* HENSEL, SUPERVISOR, OFFICE OF PROBATION AND PAROLE FOR WHATCOM COUNTY, WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 144.

No. 86-5425. HAVENS *v.* INDIANA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 143.

No. 86-5428. WILLIAMS *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 793 F. 2d 303.

No. 86-5433. BAGLEY *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 393 N. W. 2d 329.

No. 86-5437. CLINTON *v.* GEORGIA PORTS AUTHORITY. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 171.

No. 86-5438. WARREN *v.* ALLGOOD ET AL. C. A. 11th Cir. Certiorari denied.

No. 86-5440. ALVES *v.* HAMILTON, FULTON, AND MONTGOMERY COUNTIES BOCES ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 117 App. Div. 2d 839, 498 N. Y. S. 2d 733.

No. 86-5446. TUCKER *v.* SPEARS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 1419.

No. 86-5447. FEGLEY *v.* MCCLAIN, JUDGE. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 457.

No. 86–5449. YOUNG *v.* CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 785 F. 2d 1033.

No. 86–5454. PEREZ *v.* SULLIVAN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 793 F. 2d 249.

No. 86–5458. EDABURN *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 130 Wis. 2d 542, 393 N. W. 2d 548.

No. 86–5459. BERGER *v.* NADLER, JUDGE. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1131.

No. 86–5460. CENTENO *v.* THRIFTY DRUG STORES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 144.

No. 86–5463. HALL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 95.

No. 86–5467. VAZQUEZ ET AL. *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE. C. A. 3d Cir. Certiorari denied. Reported below: 788 F. 2d 130.

No. 86–5472. CREASEY *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 472.

No. 86–5473. CARR *v.* PARKS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 1475.

No. 86–5474. CARR *v.* CIRCUIT COURT OF KANAHWA COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 798 F. 2d 1408.

No. 86–5475. LEWIS *v.* MARTIN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 1560.

No. 86–5478. PERKINS *v.* CABANA, SUPERINTENDENT, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 794 F. 2d 168.

No. 86–5480. HARVEY *v.* MCLENNAN COUNTY JAIL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 798 F. 2d 1410.

No. 86–5484. ELLISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 793 F. 2d 942.

No. 86–5486. JARAMILLO *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1019.

No. 86–5487. DUVALL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 86–5489. HINDMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 475.

No. 86–5490. JOHNSON *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 898.

No. 86–5491. DONG JOON AHN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 469.

No. 86–5493. ZAKY *v.* UNITED STATES VETERANS ADMINISTRATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 832.

No. 86–5494. BARBER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 914.

No. 86–5497. SAUNDERS *v.* MCMACKEN, SUPERINTENDENT, HOCKING CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1416.

No. 86–5498. TAYLOR *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 86–5505. THOMAS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86–5507. BOURGEOIS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 488 So. 2d 695.

No. 86–5511. RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 796 F. 2d 1477.

No. 86–5512. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 761.

No. 86–5516. LIZOTTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 683.

No. 86-5519. CHIRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 317.

No. 86-5523. TONEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 1563.

No. 86-5525. CLEARY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1140.

No. 86-5536. CAMPO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 793 F. 2d 1251.

No. 86-5543. MILLER *v.* BEORN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 790 F. 2d 84.

No. 86-5552. NELSON *v.* THIERET, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 146.

No. 86-5556. FARESE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 939.

No. 86-5563. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1141.

No. 86-5575. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 1333.

No. 86-5577. KIMBERLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 781 F. 2d 1247.

No. 86-5578. BRINAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 797 F. 2d 980.

No. 86-5583. WREN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1179.

No. 85-1962. RIDDICK ET AL. *v.* SCHOOL BOARD OF CITY OF NORFOLK ET AL. C. A. 4th Cir. Motion of Lawyers' Committee for Civil Rights Under Law et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 784 F. 2d 521.

No. 86-326. BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89 *v.* DOWELL ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 795 F. 2d 1516.

No. 86-380. MICHIGAN BEER & WINE WHOLESALERS ASSN. *v.* ATTORNEY GENERAL OF MICHIGAN ET AL. Ct. App. Mich. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 142 Mich. App. 294, 370 N. W. 2d 328.

No. 86-389. CITY OF BIRMINGHAM *v.* AMERICAN CIVIL LIBERTIES UNION ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 791 F. 2d 1561.

No. 85-7111. PEEK *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari and set case for oral argument. Reported below: 784 F. 2d 1479.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 86-48. MESSINO *v.* UNITED STATES;
No. 86-5114. HLAVACH *v.* UNITED STATES;
No. 86-5120. COVELLO *v.* UNITED STATES; and
No. 86-5277. TURNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 791 F. 2d 489.

JUSTICE WHITE, dissenting.

The Courts of Appeals are divided over the kind of agreement necessary to support a conviction for so-called RICO conspiracy. In this case, the Court of Appeals for the Seventh Circuit acknowledged that there is "a clear division among the circuit courts that have considered the issue." *United States* v. *Neapolitan*, 791 F. 2d 489, 494-495 (1986). I adhere to the view expressed in my dissent in *Adams* v. *United States*, 474 U. S. 971 (1985), that we should grant certiorari and resolve this conflict.

No. 86-152. INVESTMENT COMPANY INSTITUTE *v.* CLARKE ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 252 U. S. App. D. C. 364, 790 F. 2d 925.

No. 86-153. INVESTMENT COMPANY INSTITUTE *v.* CLARKE ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 793 F. 2d 220.

No. 86–154. INVESTMENT COMPANY INSTITUTE *v.* CLARKE ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 789 F. 2d 175.

No. 86–195. ARKON SHIPPING AGENCY, INC., ET AL. *v.* KASSAPAS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KASSAPAS, ET AL. Ct. App. La., 5th Cir. Motion of Maritime Law Association of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 485 So. 2d 565.

No. 86–223. NEAPOLITAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 791 F. 2d 489.

No. 86–367. NEW MEXICO TAXATION AND REVENUE DEPARTMENT *v.* RAMAH NAVAJO SCHOOL BOARD, INC., ET AL. Ct. App. N. M. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 104 N. M. 302, 720 P. 2d 1243.

No. 86–376. CONNECTICUT *v.* BADGETT. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 200 Conn. 412, 512 A. 2d 160.

No. 86–448. CONNECTICUT *v.* GRAY. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 200 Conn. 523, 512 A. 2d 217.

No. 86–5029. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 791 F. 2d 170.

No. 86–5234. BROWN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 345 S. E. 2d 393.

JUSTICE O'CONNOR, concurring.

I write briefly in support of the Court's denial of the petition for certiorari in this case, and to respond to JUSTICE BRENNAN's suggestion that the limits on the prosecutor's right to peremptorily challenge jurors found in *Batson* v. *Kentucky*, 476 U. S. 79

(1986), apply outside the context of racial discrimination forbidden by the Equal Protection Clause. *Batson* does not touch, indeed, it clearly reaffirms, *id.*, at 89, the ordinary rule that a prosecutor may exercise his peremptory strikes for any reason at all. *Batson*, in my view, depends upon this Nation's profound commitment to the ideal of racial equality, a commitment that refuses to permit the State to act on the premise that racial differences matter. It is central to *Batson* that a "person's race simply 'is unrelated to his fitness as a juror.'" *Id.*, at 87 (citation omitted).

There is no basis for declaring that a juror's attitudes towards the death penalty are similarly irrelevant to the outcome of a capital sentencing proceeding. Indeed, *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), upon which JUSTICE BRENNAN's dissent so heavily relies, itself recognizes the relevance of this attitudinal factor. Categorical exclusion of jurors with moral qualms over capital punishment is forbidden precisely because such a practice would produce "a jury uncommonly willing to condemn a man to die." *Id.*, at 521.

Moreover, JUSTICE BRENNAN's dissent ignores a fundamental distinction between peremptory challenges of jurors and challenges for cause. Challenges for cause permit the categorical and unlimited exclusion of jurors exhibiting an inability to serve fairly and impartially in the case to be tried, as noted in *Wainwright* v. *Witt*, 469 U. S. 412 (1985). In *Witherspoon*, the Court held that the Constitution does not tolerate such a categorical exclusion of jurors who merely express moral scruples about or general objections to capital punishment unless it would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright* v. *Witt*, *supra*, at 424 (citation omitted).

Peremptory challenges are limited in number. Each party, the prosecutor, and the defense counsel, must balance a host of considerations in deciding which jurors should be peremptorily excused. Permitting prosecutors to take into account the concerns expressed about capital punishment by prospective jurors, or any other factor, in exercising peremptory challenges simply does not implicate the concerns expressed in *Witherspoon*.

We ought not delude ourselves that the deep faith that race should never be relevant has completely triumphed over the painful social reality that, sometimes, it may be. That the Court will not tolerate prosecutors' racially discriminatory use of the pe-

remptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact. In my view, that special rule is a product of the unique history of racial discrimination in this country; it should not be divorced from that context. Outside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike a juror without giving any reason applies. Because a juror's attitudes towards the death penalty may be relevant to how the juror judges, while, as a matter of law, his race is not, this case is not like *Batson*.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I nevertheless would grant certiorari because the petitioner presents strong evidence that the State used its peremptory challenges in this case to exclude jurors that it was forbidden to excuse for cause under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968).

In *Witherspoon*, this Court held that, in a capital case, the prosecution may not exclude for cause those jurors who indicate that they have scruples about the death penalty, but who nonetheless state that such beliefs would not prevent them from performing their duties as jurors according to law. Exclusion of such jurors, we said, denies a capital defendant the right to sentencing by an impartial jury that is representative of the community, for it "produce[s] a jury uncommonly willing to condemn a man to die." *Id.*, at 521. We underscored the importance of this right in *Adams* v. *Texas*, 448 U. S. 38 (1980), which held unconstitutional the exclusion of jurors who acknowledged that their concerns about capital punishment might affect their ability to find facts that would lead to its automatic imposition. Texas could not, we said, bar jurors who stated that they would honestly find the relevant facts if convinced of their existence beyond a reasonable doubt,

> "yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will

> be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." *Id.*, at 50.

The petitioner in the case before us, David J. Brown, was convicted of the first-degree murder of two women and given two death sentences. At *voir dire*, the prosecutor had sought to determine not merely if prospective jurors had any scruples about the death penalty that might impair their performance, but if they had any scruples about it at all. The prosecutor was remarkably candid about this objective in addressing the venire at the start of *voir dire:*

> "'We want to know if you do in fact believe in capital punishment, not wavering. We want to know at the outset, that is when we approve you as a juror, if we do, that you surely do believe in capital punishment in some cases, and that you can, if necessary, make a decision that would involve capital punishment.'" Pet. for Cert. 10.

As the *voir dire* reveals, the prosecutor diligently pursued his goal of seating only those jurors rigidly committed to the death penalty:

> "Q.: Mr. Caldwell, how do you feel about capital punishment? Are you for it or against it?
> "A.: I am for it.
> "Q.: I didn't understand you.
> "A.: I said I'm for it.
> "Q.: How long have [you] been in favor of capital punishment in some cases, Mr. Caldwell?
> "A.: All my life, every time I hear tale of something like that, about all my life, I guess.
> "Q.: That's what I wanted to hear, Mr. Caldwell.
> . . . . .
> "Q.: Mrs. Pope, do you know your mind to the extent of saying whether or not you believe in capital punishment?
> "A.: I do.
> "Q.: Have all of your adult life?

"A.: Yes, sir.
"Q.: And if ultimately you are called upon after a proper instruction by the Judge to carefully consider what should happen to, to determine life or death, that wouldn't bother you unduly, will it?
"A.: No, sir." *Id.*, at 7, 9–10.

In another exchange, after juror Williams stated that he believed in capital punishment, the prosecutor continued to question him to establish that he had the "'strength and fortitude'" to render a death verdict "without 'any doubt.'" *Id.*, at 10.

Those jurors who indicated the slightest uncertainty about the death penalty were excused by peremptory challenge, without inquiry into whether their convictions would render them incapable of performing their duties as jurors:

"Q.: Mrs. Beaver, having sat here for some several minutes in this courtroom today, you know what we are here for?
"A.: Yes.
"Q.: Having thoughts about capital punishment, at least I would assume here today, and no doubt having thought about it in the past, do you know your mind about that question?
"A.: I'm afraid I don't.
"Q.: Afraid you don't?
"A.: No.
"[Prosecutor:] The State will excuse Mrs. Beaver with our thanks." *Id.*, at 9.

The State concedes that it could not have excused for cause those jurors failing the prosecutor's litmus test. It maintains, however, that since it used peremptory challenges to accomplish this end, its conduct is immune from scrutiny. The State reads our recent decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), as significant only in that it proscribes racially discriminatory peremptory challenges. It insists that, since the challenges were exercised in this case in a racially neutral manner, they are free from constitutional infirmity.

The implication of the State's position is that it is free to use its peremptory challenges to violate any constitutional command other than the Equal Protection Clause. The State, however, misses the wider significance of *Batson:* that the broad discretion

afforded prosecutors in the exercise of peremptory challenges may not be abused to accomplish *any* unconstitutional end. In *Batson*, we said that "counsel's effort to obtain *possibly relevant* information about prospective jurors is to be distinguished from the practice at issue here." *Id.*, at 89, n. 12 (emphasis added).

JUSTICE O'CONNOR's concurrence observes that, as an unfortunate matter of *fact*, race may be relevant in that it may actually influence a juror's decision. The concurrence correctly notes that such factual relevance is insufficient to justify the exercise of a peremptory challenge on the basis of a juror's race, because race has been deemed irrelevant as a matter of *law*. The concurrence, however, fails to recognize that precisely the same situation obtains with respect to scruples about the death penalty. Such scruples may be relevant as a matter of *fact*. Nonetheless, that is insufficient to justify the use of peremptory challenges to exclude jurors with such scruples, for *Witherspoon* and *Adams* make clear that this characteristic is irrelevant as a matter of *law*. It does not minimize the tragic history of race discrimination in this country to insist that we enforce the *Witherspoon* proscription just as faithfully as that forbidding reliance on race, for we may not pick and choose which constitutional rights we will and will not vindicate in monitoring the jury selection process.

Peremptory challenges may be used for reasons that may not comport completely with rational analysis, or that may resist coherent articulation. Such latitude has for practical reasons required a presumption that these challenges are exercised in a constitutionally responsible fashion. As *Batson* makes clear, however, that presumption is rebuttable. In this case, the Court is presented with evidence from the *voir dire* that plainly indicates that the prosecutor used his peremptory challenges to obtain the "hanging jury," *Witherspoon*, 391 U. S., at 523, that he could not obtain through challenges for cause. We therefore cannot maintain the usual presumption that these challenges were properly used.

Agents of the State enjoy considerable discretion in performing certain functions within the criminal justice system. With great discretion, however, comes great responsibility. When a court has evidence that the State has not lived up to that responsibility, its refusal to intervene converts discretion into a license for constitutional violation. For this reason, I would grant the petition for certiorari in this case.

No. 86–5310. ROBERTS *v.* MISSOURI. Sup. Ct. Mo.; and

No. 86–5482. MARLOWE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: No. 86–5310, 709 S. W. 2d 857; No. 86–5482, 709 S. W. 2d 424.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 86–5499. REIDT *v.* UNITED STATES. C. A. 9th Cir. Certiorari before judgment denied.

NOVEMBER 10, 1986

Appeals Dismissed

No. 86–424. STICH *v.* STICH. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 169 Cal. App. 3d 64, 214 Cal. Rptr. 919.

No. 86–5537. FERRIS *v.* CALIFORNIA. Appeal from Ct. App. Cal., 6th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–5593. NICHOLAS *v.* UNITED STATES. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–5559. BUTLER *v.* TEXAS. Appeal from Ct. App. Tex., 3d Dist., dismissed for want of substantial federal question.

Miscellaneous Orders

No. — — ——. MECHANICAL TECHNOLOGY, INC. *v.* RYDER TRUCK LINES, INC. Motion of respondent Ryder Truck Lines, Inc., to direct the Clerk not to file the petition for writ of certiorari for failure to comply with Rule 33.7 denied.

No. A–283. SYKES *v.* VAN DE WATER ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. 86–5545. PREISER *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 1, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86–5547. IN RE JOHL. D. C. Conn. Petition for writ of common-law certiorari denied.

No. 86–5526. IN RE GLAZEBROOK. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 86–251. ROCKFORD LIFE INSURANCE CO. *v.* ILLINOIS DEPARTMENT OF REVENUE ET AL. Appeal from Sup. Ct. Ill. Probable jurisdiction noted. Reported below: 112 Ill. 2d 174, 492 N. E. 2d 1278.

No. 86–341. FORT HALIFAX PACKING CO., INC. *v.* COYNE, DIRECTOR, BUREAU OF LABOR STANDARDS OF MAINE, ET AL. Appeal from Sup. Jud. Ct. Me. Probable jurisdiction noted. Reported below: 510 A. 2d 1054.

No. 86–357. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* SCHEINER, SECRETARY, DEPARTMENT OF REVENUE OF PENNSYLVANIA, ET AL. Appeal from Sup. Ct. Pa. Probable jurisdiction noted. Reported below: 510 Pa. 430, 509 A. 2d 838.

Certiorari Granted

No. 86–130. ROCK *v.* ARKANSAS. Sup. Ct. Ark. Certiorari granted. Reported below: 288 Ark. 566, 708 S. W. 2d 78.

No. 86–228. KUNGYS *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 793 F. 2d 516.

No. 86–461. BOARD OF PARDONS ET AL. *v.* ALLEN ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 792 F. 2d 1404.

No. 86–246. SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. *v.* SHUMAN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 791 F. 2d 788.

Certiorari Denied. (See also Nos. 86–424, 86–5537, 86–5593, and 86–5547, *supra.*)

No. 85-1986. ANDERSON *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 85–2049. CHOON YOUNG CHUNG *v.* NANA DEVELOPMENT CORP. C. A. 4th Cir. Certiorari denied. Reported below: 783 F. 2d 1124.

No. 85–7031. YOUNG *v.* SCHMIDT. C. A. 8th Cir. Certiorari denied.

No. 85–7203. REEVES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 935.

No. 86–22. MICHIGAN *v.* PARHAM. Ct. App. Mich. Certiorari denied. Reported below: 147 Mich. App. 358, 382 N. W. 2d 786.

No. 86–205. HOWARD TRUCKING CO., INC. *v.* STASSI ET AL. Sup. Ct. La. Certiorari denied. Reported below: 485 So. 2d 915.

No. 86–259. CITY OF DES MOINES, IOWA, ET AL. *v.* WILLSON. Sup. Ct. Iowa. Certiorari denied. Reported below: 386 N. W. 2d 76.

No. 86–399. HAMILL *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1018.

No. 86–430. TRANS WORLD AIRLINES ET AL. *v.* DISSELL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 511 A. 2d 441.

No. 86–433. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* KNOWLES. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 1038.

No. 86–435. STOWE-WOODWARD CO. *v.* VIOCK ET AL. Ct. App. Ohio, Erie County. Certiorari denied.

No. 86-437. DABISH, EXECUTRIX OF THE ESTATE OF DABISH *v.* CHARTER ARMS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 932.

No. 86-439. CENTURY BRASS PRODUCTS, INC. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 265.

No. 86-441. CHICAGO SYSTEMS SOFTWARE ET AL. *v.* EVANS NEWTON, INC. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 889.

No. 86-447. DAWN DEVELOPERS, INC., ET AL. *v.* REAL ESTATE CORPORATION OF FLORIDA, N. V. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 489 So. 2d 32.

No. 86-449. CITY OF WILDWOOD *v.* ANELA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 790 F. 2d 1063.

No. 86-452. DIXON *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 932.

No. 86-454. MCI TELECOMMUNICATIONS CORP. *v.* KELLERMAN, DBA AUTHORIZED SALES & SERVICE, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 112 Ill. 2d 428, 493 N. E. 2d 1045.

No. 86-456. AHMAD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 121 App. Div. 2d 287, 503 N. Y. S. 2d 536.

No. 86-457. RICHARDSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 345 Pa. Super. 621, 496 A. 2d 854.

No. 86-462. KAISER CEMENT CORP. *v.* FISCHBACH & MOORE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 793 F. 2d 1100.

No. 86-463. FIORELLO ET AL. *v.* EATON CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 589.

No. 86-464. MARTORI BROS. DISTRIBUTORS ET AL. *v.* JAMES-MASSENGALE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 781 F. 2d 1349 and 791 F. 2d 799.

No. 86-467. LANGLEY ET AL. *v.* YOUNG. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 792.

No. 86-469. ORANGE *v.* BOMERSHEIM ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 678.

No. 86-480. DARBY DENTAL SUPPLY CO., INC., ET AL. *v.* PREMIER DENTAL PRODUCTS CO. C. A. 3d Cir. Certiorari denied. Reported below: 794 F. 2d 850.

No. 86-502. CUMBERLAND OIL CORP. ET AL. *v.* THROPP ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 791 F. 2d 1037.

No. 86-507. TRANS INTERNATIONAL AIRLINES *v.* NEWSOME ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 492 So. 2d 592.

No. 86-513. ORTHO PHARMACEUTICAL CORP. *v.* WELLS, BY HER MOTHER AND NEXT FRIEND, MAIHAFER, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 741.

No. 86-524. BERGH ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 794 F. 2d 1575.

No. 86-540. QUILLEN *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 1293.

No. 86-587. FORTNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 796 F. 2d 724.

No. 86-596. SUTHERLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 795 F. 2d 1008.

No. 86-5073. ABBOTT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 719 P. 2d 1289.

No. 86-5076. CURNEW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 788 F. 2d 1335.

No. 86-5096. BLACKSTON *v.* SECRETARY OF THE NAVY. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 915.

No. 86-5108. WEBB *v.* WAINWRIGHT, SECRETARY OF FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1178.

No. 86-5130. HAYNES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 944, 494 N. E. 2d 121.

No. 86-5159. FREEBURG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 790 F. 2d 85.

No. 86-5218. PORTER *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 141 Ill. App. 3d 71, 489 N. E. 2d 1154.

No. 86-5256. KENNEDY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 491 So. 2d 279.

No. 86-5356. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 795 F. 2d 88.

No. 86-5439. YATES *v.* SECRETARY OF THE ARMY. C. A. Fed. Cir. Certiorari denied.

No. 86-5444. ABUSHAAR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1140.

No. 86-5457. CULBRETH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 791 F. 2d 926.

No. 86-5466. RECTOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 680.

No. 86-5469. WRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 594.

No. 86-5477. DONALDSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86-5485. JOHNPOLL *v.* CARLSON, DIRECTOR, UNITED STATES BUREAU OF PRISONS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 798 F. 2d 467.

No. 86-5488. IN RE BRYANT. C. A. 11th Cir. Certiorari denied.

No. 86-5492. KEARNEY *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 86-5515. KINNELL *v.* MASCHNER, DIRECTOR, KANSAS STATE PENITENTIARY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 86-5517. HOLT *v.* WELDON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1180.

No. 86-5521. RODMAN *v.* TAYLOR ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 459.

No. 86-5522. MINIS *v.* OHIO UNEMPLOYMENT COMPENSATION BOARD OF REVIEW. Sup. Ct. Ohio. Certiorari denied.

No. 86-5528. BROWN *v.* SEAWELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 1560.

No. 86-5529. CHAMBERS *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 139 Ill. App. 3d 550, 487 N. E. 2d 1142.

No. 86-5534. BEEMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86-5535. HERZOG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 794 F. 2d 685.

No. 86-5538. BELL *v.* STONE. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 1290.

No. 86-5546. BROWN *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 86-5553. RILEY *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 86-5603. BITTNER *v.* UNITED STATES PAROLE COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 802 F. 2d 463.

No. 86-5615. COLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 796 F. 2d 380.

No. 86-5628. ELKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 795 F. 2d 919.

No. 86–5630. HEATH *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 85.

No. 86–5659. GUPTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 391.

No. 85–1922. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* DEANGELO. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 781 F. 2d 1516.

No. 86–445. NEW YORK *v.* SMITH. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 68 N. Y. 2d 737, 497 N. E. 2d 689.

No. 86–143. MUSTAFA, AKA BROWN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 165.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In this case the trial court admitted, over petitioner's objection, the testimony of a purported expert on blood spatter techniques. On appeal, the Court of Military Appeals held that the testimony in question was admissible under Military Rule of Evidence 702, which is worded identically to Federal Rule of Evidence 702. The court held that the so-called *Frye* test for determining the admissibility of expert testimony, see *Frye* v. *United States*, 54 App. D. C. 46, 47, 293 F. 1013, 1014 (1923), was superseded by the 1975 enactment of the Federal Rules of Evidence. The court described Military Rule 702 as establishing a much lower threshold than *Frye* for determining whether a given person is an expert. This conclusion is supported by decisions interpreting Federal Rule of Evidence 702 as establishing a more flexible standard of admissibility than the *Frye* test. See, *e. g.*, *United States* v. *Downing*, 753 F. 2d 1224 (CA3 1985). Other courts, however, have interpreted Federal Rule of Evidence 702 as incorporating the *Frye* test. *Barrel of Fun, Inc.* v. *State Farm Fire & Casualty Co.*, 739 F. 2d 1028, 1031, n. 9 (CA5 1984); *United States* v. *McBride*, 786 F. 2d 45, 49 (CA2 1986). I would grant certiorari to resolve this conflict on an obviously recurring and important issue.

No. 86–386. UNITED STATES STEEL CORP. ET AL. *v.* PRYOR. C. A. 2d Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR would grant certiorari. Reported below: 794 F. 2d 52.

No. 86–5211. REED *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 790 F. 2d 208.

JUSTICE WHITE, dissenting.

In this case, the District Court permitted a 13th, alternate juror to participate in the jury's deliberations, a procedure to which petitioner's counsel stipulated. The 13 jurors unanimously found petitioner guilty. On appeal, petitioner argued that the use of a 13-member jury violated Federal Rule of Criminal Procedure 24(c), that the Rule is not waivable, and that even if it is, it can only be waived by a defendant personally and not by counsel. The Court of Appeals held that petitioner, through his counsel, had waived compliance with Rule 24(c). It concluded that "[b]ecause the waiver herein was neither prejudicial nor of constitutional magnitude and was made in the presence of the defendant in open court, . . . the failure to obtain appellant's personal assent . . . , [if erroneous,] was harmless beyond a reasonable doubt." 790 F. 2d 208, 211 (CA2 1986). This decision conflicts with *United States* v. *Virginia Erection Corp.*, 335 F. 2d 868, 870 (CA4 1964), which requires a defendant's express and personal waiver of Rule 24(c), assuming that the Rule can be waived at all. See also *United States* v. *Chatman*, 584 F. 2d 1358 (CA4 1978) (explaining *Virginia Erection* as establishing a *per se* rule of plain error in cases where Rule 24(c) is violated without obtaining a defendant's personal consent); *United States* v. *Beasley*, 464 F. 2d 468 (CA10 1972) (holding, in a case not involving an issue of waiver, that violations of Rule 24(c) are reversible *per se*, and approving the result in *Virginia Erection*). I would grant certiorari to resolve this conflict.

No. 86–5321. MALQUIST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 791 F. 2d 1399.

No. 86–5542. WOODS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 490 So. 2d 24.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth

and Fourteenth Amendments, I would vacate the judgment of the Florida Supreme Court insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). Even if I believed, however, that the death penalty could constitutionally be imposed under certain circumstances, petitioner's youth and mental condition preclude imposition of a sentence of death under the requirements of the Eighth Amendment.

Petitioner Ronald Woods was convicted of first-degree murder and sentenced to death in connection with the stabbing of a guard at the Union Correctional Institution, at which Woods was an inmate. The Florida Supreme Court affirmed petitioner's conviction and death sentence. 490 So. 2d 24 (1986). Woods was 18 years old at the time of his trial. *Id.*, at 28, n. 7. The evidence submitted to the trial court in mitigation of sentence showed that petitioner had suffered seizures in childhood, and had sustained brain damage. Pet. for Cert. 20. Petitioner's IQ is reported to be below 73, within the borderline range of mental retardation. *Ibid.*

I believe that the imposition of capital punishment for crimes committed by juveniles is unconstitutionally cruel punishment forbidden by the Eighth Amendment. "Although '[c]rimes committed by youths may be just as harmful to victims as those committed by older persons, . . . they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.'" *Roach* v. *Aiken*, 474 U. S. 1039 (1986) (BRENNAN, J., dissenting) (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978)); see also *Eddings* v. *Oklahoma*, 455 U. S. 104, 115–116 (1982). These considerations are particularly compelling where, as here, the offender's mental capacities are organically impaired. While the trial court treated petitioner's youth as a mitigating circumstance, it did not consider whether petitioner's mental retardation, or the combination of his youth and mental incapacity, presented a circumstance that might foreclose application of the death penalty.

The execution of a mentally retarded child in retribution for a crime committed at or before the age of 18 cannot, in my judgment, be reconciled with the requirements of the Eighth Amendment, or with our fundamental commitment to the preservation of human rights. I would grant the petition for certiorari.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

In view of the presence in the courtroom throughout the trial of a substantial number of uniformed guards (up to as many as 45) and the trial court's denial of petitioner's request to clear the courtroom of uniformed spectators, and the failure of the Supreme Court of Florida in its opinion, see 490 So. 2d 24, 26–27 (1986), even to cite this Court's then recent decision in *Holbrook* v. *Flynn*, 475 U. S. 560 (1986), I would grant the petition for certiorari, vacate the judgment below, and remand the case to the Supreme Court of Florida for reconsideration in light of *Holbrook*.

No. 86–5548 (A–334). VANWOUDENBERG *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 720 P. 2d 328.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 86–5591. INGRAM *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 691 F. 2d 498.

Rehearing Denied

No. 85–2080. GRACE *v.* HEARTLAND TRANSPORTATION, INC., *ante*, p. 825;

No. 85–2081. IN RE GRACE, *ante*, p. 810;

No. 85–2082. IN RE GRACE, *ante*, p. 809;

No. 85–6575. GUTHRIE *v.* SOWDERS, WARDEN, *ante*, p. 830;

No. 85–7000. DAVIDSON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 836;

No. 85–7010. KING *v.* ILLINOIS, *ante*, p. 872;

No. 85–7225. IN RE MCDONALD, *ante*, p. 809;

No. 86–5031. STONER *v.* REES, WARDEN, *ante*, p. 857;

No. 86–5045. SMITH *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 857;

No. 86–5053. PENA-PEREZ *v.* LOUISIANA STATE BAR ASSN., *ante*, p. 858; and

No. 86–5248. DACE *v.* SOUTH DAKOTA ET AL., *ante*, p. 867. Petitions for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of these petitions.

NOVEMBER 12, 1986

Dismissal Under Rule 53

No. 85–1623. ISLAMIC REPUBLIC OF IRAN ET AL. *v.* BOEING CO. ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 771 F. 2d 1279.

NOVEMBER 17, 1986

Appeal Dismissed

No. 86–5576. ALLEN *v.* DEPARTMENT OF HUMAN RESOURCES. Appeal from Super. Ct. Ga., Baldwin County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed. (See No. 86–21, *ante*, p. 85.)

Certiorari Granted—Vacated and Remanded

No. 85–1011. UNITED STATES *v.* HARRIS ET UX. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *O'Connor* v. *United States*, *ante*, p. 27. Reported below: 768 F. 2d 1240.

Certiorari Granted—Reversed and Remanded. (See No. 86–139, *ante*, p. 92.)

Miscellaneous Orders

No. — – ——. CANE *v.* SOWDERS, WARDEN. Motion to proceed *in forma pauperis* without submitting an affidavit in support thereof granted.

No. A–176 (86–5387). LAFRAMBOISE *v.* ALASKA. Ct. App. Alaska. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–369. MARTIN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

No. D–588. IN RE DISBARMENT OF SPEERT. It is ordered that Victor Allen Speert, of Austin, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–589. IN RE DISBARMENT OF BENEDICT. It is ordered that Mark J. Benedict, of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–590. IN RE DISBARMENT OF KAZDOY. It is ordered that Alan Craig Kazdoy, of Midlothian, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84–6075. TISON *v.* ARIZONA (two cases). Sup. Ct. Ariz. [Certiorari granted, 475 U. S. 1010.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 85–732. WESTERN AIR LINES, INC., ET AL. *v.* BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA ET AL. Sup. Ct. S. D. [Probable jurisdiction noted, 475 U. S. 1008.] The parties are directed to file supplemental briefs within 20 days addressing the following questions:

"1. Under 49 U. S. C. § 1513(d)(3), the subsection 'shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.' Is the question whether a state tax is an 'in lieu tax which is wholly utilized for airport and aeronautical purposes,' one of state or federal law?

"2. If federal law governs the question whether a tax is an 'in lieu tax' under § 1513(d)(3), is the South Dakota Airline Flight

Property Tax, S. D. Codified Laws, Ch. 10–29, an 'in lieu tax' under § 1513(d)(3)?"

The Solicitor General is invited to file a brief within 20 days expressing the views of the United States on these questions. JUSTICE WHITE and JUSTICE MARSHALL dissent from the order directing supplemental briefing.

No. 85–782. IMMIGRATION AND NATURALIZATION SERVICE *v.* CARDOZA-FONSECA. C. A. 9th Cir. [Certiorari granted, 475 U. S. 1009.] Motion of the Solicitor General for leave to file a supplemental brief after argument granted.

No. 85–1626. GOODMAN ET AL. *v.* LUKENS STEEL CO. ET AL. C. A. 3d Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 85–1645. LUKENS STEEL CO. *v.* UNITED POLITICAL ACTION COMMITTEE ET AL. C. A. 3d Cir. Motion of the parties to defer consideration of the petition for writ of certiorari granted.

No. 86–71. CTS CORP. *v.* DYNAMICS CORPORATION OF AMERICA; and

No. 86–97. INDIANA *v.* DYNAMICS CORPORATION OF AMERICA. C. A. 7th Cir. [Probable jurisdiction noted, *ante*, p. 810.] Motion of appellants to dispense with printing the joint appendix granted.

No. 86–87. UNITED STATES *v.* SALERNO ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 929.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86–104. BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES ET AL. *v.* JEWS FOR JESUS, INC., ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 812.] Motion of Andrew J. Ekonomou, Esquire, to permit Jay Alan Sekulow to present oral argument *pro hac vice* granted.

No. 86–5524. MAYER *v.* ANGELICA. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 8, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari

without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86–5718. IN RE MIESBAUER. Petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 86–98. RIVERA *v.* MINNICH. Appeal from Sup. Ct. Pa. Probable jurisdiction noted. Reported below: 509 Pa. 588, 506 A. 2d 879.

Certiorari Granted

No. 86–281. RAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 791 F. 2d 929.

No. 86–511. COMMISSIONER OF INTERNAL REVENUE *v.* FINK ET UX. C. A. 6th Cir. Certiorari granted. Reported below: 789 F. 2d 427.

No. 86–475. FRAZIER *v.* HEEBE, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, ET AL. C. A. 5th Cir. Motion of American Corporate Counsel Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 788 F. 2d 1049.

No. 86–510. UNITED STATES *v.* HOHRI ET AL. C. A. D. C. Cir. Certiorari granted. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 251 U. S. App. D. C. 145, 782 F. 2d 227.

No. 86–526. CATERPILLAR INC. ET AL. *v.* WILLIAMS ET AL. C. A. 9th Cir. Motion of Merchants & Manufacturers Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 786 F. 2d 928.

No. 86–5344. MILLER *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 488 So. 2d 820.

Certiorari Denied. (See also No. 86–5576, *supra*.)

No. 85–2047. FLORIDA *v.* KANE. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 483 So. 2d 66.

No. 85–2077. BRYAN ET AL. *v.* ERKINS ET AL.; and

No. 86–372. UNITED STEELWORKERS OF AMERICA *v.* ERKINS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 1538.

No. 85–6911. HYCHE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 203.

No. 85–6917. MOSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 402.

No. 85–6992. GARDNER *v.* LUSBY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 308.

No. 85–7019. GANUS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 136 Ill. App. 3d 1161, 497 N. E. 2d 1042.

No. 85–7094. THIBAULT *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 6.

No. 85–7179. TRENCH *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 783 F. 2d 181.

No. 86–170. PROVENZANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 533.

No. 86–280. OUTBOARD MARINE CORP. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 789 F. 2d 497.

No. 86–311. RICHARDS *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1016.

No. 86–314. ALLEY ET VIR *v.* GUBSER DEVELOPMENT CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 785 F. 2d 849.

No. 86–351. CITY OF ST. CHARLES ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 794 F. 2d 265.

No. 86–352. KRZYSKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 86-362. HOUSE OF WHEAT ET AL. *v.* WRIGHT ET AL. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 86-404. WHALEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 581.

No. 86-442. AIR LINE EMPLOYEES ASSN., INTERNATIONAL *v.* REPUBLIC AIRLINES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 798 F. 2d 967.

No. 86-485. MAYNARD, WARDEN *v.* BOWEN. C. A. 10th Cir. Certiorari denied. Reported below: 799 F. 2d 593.

No. 86-486. COHEN, SECRETARY, PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, ET AL. *v.* CLARK. C. A. 3d Cir. Certiorari denied. Reported below: 794 F. 2d 79.

No. 86-488. POWELL *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 86-494. STORY *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 721 P. 2d 1020.

No. 86-498. GILMORE *v.* ZIMMERMAN, ATTORNEY GENERAL OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 793 F. 2d 564.

No. 86-508. MASTROPIETRO *v.* MASTROPIETRO. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86-515. JUDY'S FOODS, INC., ET AL. *v.* A & B FOOD SERVICES CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 468.

No. 86-517. BOLES *v.* ELLIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 7.

No. 86-519. SCHIAVONE CONSTRUCTION CO. ET AL. *v.* MEROLA, DISTRICT ATTORNEY OF BRONX COUNTY, NEW YORK. C. A. D. C. Cir. Certiorari denied.

No. 86-535. LEE *v.* UNION ELECTRIC CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 789 F. 2d 1303.

No. 86-605. KEVAL *v.* WEINBERGER, SECRETARY OF DEFENSE. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 473.

No. 86–616. ROGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 795 F. 2d 1008.

No. 86–617. BECKER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 799 F. 2d 753.

No. 86–627. MONTGOMERY ET AL. *v.* BOARD OF ZONING ADJUSTMENTS OF CITY OF NEW ORLEANS ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 488 So. 2d 1277.

No. 86–658. BADER ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 469.

No. 86–659. REYNOLDS ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 469.

No. 86–660. BRUCE *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 469.

No. 86–661. ALLEN ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 469.

No. 86–5017. GRAYBILL *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 782 F. 2d 1567.

No. 86–5054. MENDIOLA-NAVARETTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 790 F. 2d 85.

No. 86–5077. RUFFEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1493.

No. 86–5081. RILEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 788 F. 2d 521.

No. 86–5118. CRAIG *v.* ENGLE, DEPUTY DIRECTOR, CORRECTIONAL PROGRAMS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 1291.

No. 86–5187. REEVES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 794 F. 2d 1101.

No. 86-5209. WINDSOR *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 110 Idaho 410, 716 P. 2d 1182.

No. 86-5210. LIGHTFOOT *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 171.

No. 86-5229. SALGADO-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 790 F. 2d 1265.

No. 86-5241. BELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1416.

No. 86-5261. SLADER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 791 F. 2d 655.

No. 86-5268. ARTIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 505 A. 2d 52.

No. 86-5312. ROWLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 789 F. 2d 1169.

No. 86-5328. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 792 F. 2d 1299.

No. 86-5514. LEYTON-ARGENAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 683.

No. 86-5551. STANKOWSKI *v.* CONTE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1139.

No. 86-5554. RODRIGUES *v.* GUDEMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 1458.

No. 86-5555. SMITH *v.* CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1409.

No. 86-5558. BRITTON *v.* PERINI, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1413.

No. 86-5560. BROWN *v.* WELLDON ET AL. C. A. 11th Cir. Certiorari denied.

No. 86-5561. MCCARTHY *v.* LOPES, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTIONS. Sup. Ct. Conn. Certiorari denied. Reported below: 201 Conn. 115, 513 A. 2d 139.

No. 86-5562. McRAE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 684.

No. 86-5564. HERSHIPS *v.* McCUTCHEN, DOYLE, BROWN & ENERSEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 796 F. 2d 478.

No. 86-5567. CLEMENTE *v.* CAMPOY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 682.

No. 86-5568. JONES *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 794 F. 2d 1536.

No. 86-5569. CROCHET *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 797 F. 2d 975.

No. 86-5574. PARR *v.* FOLTZ, REGIONAL ADMINISTRATOR, MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 459.

No. 86-5580. BALTSAVIAS *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 136.

No. 86-5584. MARSETT *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86-5585. SALANARDI *v.* WARDEN, METROPOLITAN CORRECTIONAL CENTER, NEW YORK, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 136.

No. 86-5643. MASTERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 937.

No. 86-5680. HOLLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 796 F. 2d 1043.

No. 86-5685. FELTON *v.* HICKS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 916.

No. 85-1903. COLORADO *v.* SANTISTEVAN. Sup. Ct. Colo. Motion of Colorado District Attorneys Council et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 715 P. 2d 792.

No. 85–2107. AMOCO OIL CO. *v.* JIM HEILIG OIL & GAS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1163.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, dissenting.

This case concerns an application of the "separate document" requirement for judgments contained in Rule 58 of the Federal Rules of Civil Procedure.[1] I dissent from the denial of certiorari because I am persuaded that the United States Court of Appeals for the Sixth Circuit misconstrued our prior cases having to do with the requirement.

Petitioner Amoco Oil Co. took an appeal from an order issued by the Bankruptcy Court for the Eastern District of Michigan. On May 21, 1985, the District Court affirmed the Bankruptcy Court's ruling by a memorandum and order consisting of a single document. Petitioner moved for reconsideration. The motion was denied on June 28 in a similar single-document memorandum and order.[2]

On July 25, 1985, Amoco filed a notice of appeal with the Court of Appeals for the Sixth Circuit. That court issued an order directing Amoco to show cause why the appeal should not be dismissed. It suggested that, because the District Court had issued

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[1] Rule 58 reads in its entirety:

"Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. *Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered* as provided in Rule 79(a). Entry of the judgment shall not be delayed for taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course." (Emphasis supplied.)

[2] Inasmuch as the motion for reconsideration was untimely, it is not clear why the District Court entertained it. See Fed. Rule Civ. Proc. 59(e). In any event, because of its untimeliness, the motion would not have tolled the time for Amoco's appeal had there been no Rule 58 problem with the District Court's original memorandum opinion and order. See Fed. Rule App. Proc. 4(a)(4).

its initial memorandum opinion and order on May 21, Amoco's filing would be 35 days late under Federal Rules of Appellate Procedure 4(a) and 26(a). App. to Pet. for Cert. C–1. In response, Amoco contended that, rather than being untimely, its appeal actually was premature, given that the District Court had never entered a judgment separate from the May 21 memorandum and order as Rule 58 requires. The Court of Appeals rejected this contention. It observed that in *Bankers Trust Co.* v. *Mallis*, 435 U. S. 381 (1978) *(per curiam)*, this Court had adopted a commonsense, rather than a technical, approach to the requirements of Rule 58 so long as no party was misled. App. to Pet. for Cert. D–1. The Court of Appeals further noted that Amoco's motion for reconsideration of the May 21 memorandum and order demonstrated that Amoco considered that opinion to be the final decision. Accordingly, the court concluded: "The mere technicality that the district court failed to file a separate judgment should not be used to give jurisdiction to this Court of an untimely filed appeal in which the parties were not misled by the lack of a separate judgment." *Id.*, at D–1 to D–2.

Rule 58 provides in pertinent part: "Every judgment shall be set forth on a separate document." See n. 1, *supra*. The genesis and purpose of this "separate document" requirement, which was added to Rule 58 by amendment in 1963, are explained in the Advisory Committee Notes. Prior to the amendment difficulties had arisen in situations where a court had "written an opinion or memorandum containing some apparently directive or dispositive words, *e. g.*, 'the plaintiff's motion [for summary judgment] is granted.'" 28 U. S. C. App., p. 627. At times court clerks had viewed these documents as a sufficient basis for entering a judgment. Problems occasionally arose, however, when the documents did not provide all the necessary elements of the judgment or when the court later would issue a formal judgment. Parties were thus uncertain as to when the judgment was effective and as to when the time began to run for purposes of filing postjudgment motions and appeals. The Advisory Committee observed: "The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment." *Id.*, at 628.

This Court already has been concerned with the interpretation of Rule 58. In *United States* v. *Indrelunas*, 411 U. S. 216 (1973)

(per curiam), it was faced with a situation where, although a docket entry had been made on March 21, 1969, which noted jury verdicts in favor of respondent and another against the Government, the formal judgment specifying the amount of the verdicts was not entered until February 25, 1971. The Court of Appeals for the Seventh Circuit dismissed the Government's appeal, filed after the 1971 entry, as untimely. This Court reviewed the history of the 1963 amendment to Rule 58 and cited with approval Professor Moore's remark that the Rule constituted "'a mechanical change that would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective.'" *Id.*, at 220 (quoting 6A J. Moore, Federal Practice § 58.04[4.–2], p. 58–161 (1972)). It also concluded that the appeal taken and abandoned by the Government during the time between the docketing of the jury verdict and the entry of judgment was not an appropriate part of the Rule 58 inquiry. It noted simply that "whatever may be the appropriate sanctions available in a particular case for capricious conduct on the part of a litigant, we do not believe that a case-by-case tailoring of the 'separate document' provision of Rule 58 is one of them." 411 U. S., at 221. Accordingly, it concluded that the mechanical application of Rule 58, as advocated by Professor Moore, was appropriate and required reversal of the Court of Appeals' judgment.

In *Bankers Trust*, *supra*, the Court returned to the separate-document matter. There the Court of Appeals for the Second Circuit had proceeded to a consideration of the merits of an appeal even though it could find no document appearing to be a judgment of the District Court. See *id.*, at 382. The Court of Appeals based its decision on the fact that the District Court and the parties assumed that the dismissal had been adjudicated. *Ibid.* We approved that conclusion. We first observed that the major purpose behind the separate-document requirement was to clarify when the time for an appeal begins to run. Citing the remarks of the Advisory Committee mentioned above, we further noted that the separate-document requirement was aimed particularly at "avoid[ing] the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely." *Id.*, at 385.

We could not see, however, how the purpose of Rule 58 or the concerns of the Advisory Committee would be served in that case by depriving the Court of Appeals of jurisdiction because of the absence of a separate document. If the court were to lose jurisdiction for this reason, then "[u]pon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose." *Ibid.* While observing that "[t]echnical application" of Rule 58 would be necessary in a situation similar to the one in *Indrelunas* to avoid a party's uncertainty as to when to bring an appeal, we concluded that the rule "should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered." 435 U. S., at 386. In this respect, we cited another remark of Professor Moore: "'[I]t must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. . . . The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss.'" *Ibid.* (quoting 9 J. Moore, Federal Practice ¶110.08[2], pp. 119–120 (1970)).

These two decisions, I believe, are to be read to support the following proposition: the separate-document requirement must be applied mechanically in order to *protect* a party's right of appeal, although parties may waive this requirement in order to maintain appellate jurisdiction of their case. Cf. 6A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice ¶58.02.1, p. 58–22 (2d ed. 1986). The fundamental error of the Court of Appeals in this case, therefore, was to employ Amoco's purported waiver to *defeat* its appeal. Amoco's filing for reconsideration might well have signaled its recognition that the May 21 order was indeed the final judgment. As the Court made clear in *Indrelunas*, however, while relevant to the question of sanctions, a party's conduct is irrelevant to the application of Rule 58 unless it serves to *maintain* the right of appeal. Given that a finding of waiver in this case results in Amoco's loss of its right of appeal, then, under our earlier decisions in *Indrelunas* and *Bankers Trust*, Rule 58 should have been applied mechanically. The Court of Appeals should have dismissed the purported appeal and directed the District Court to enter a final judgment, from which a proper appeal could lie. Accordingly, I would grant certiorari and reverse the judgment of the Court of Appeals.

No. 86-219. SOUTHERN UNION CO. *v.* JICARILLA APACHE TRIBE ET AL.;

No. 86-224. SOUTHLAND ROYALTY CO. *v.* JICARILLA APACHE TRIBE ET AL.;

No. 86-225. EXXON CORP. *v.* JICARILLA APACHE TRIBE ET AL.; and

No. 86-226. UNICON PRODUCING CO. *v.* JICARILLA APACHE TRIBE ET AL. C. A. 10th Cir. Motion of Mountain States Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 782 F. 2d 855 and 793 F. 2d 1171.

No. 86-283. COX *v.* COX. Ct. App. Cal., 4th App. Dist. Certiorari denied.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

This Court, in *McCarty* v. *McCarty*, 453 U. S. 210 (1981), held that federal law precludes a state court from dividing military retired pay pursuant to state community property laws. Congress, concerned with the effect our holding would have on the divorced spouses of retired military personnel, enacted the Uniformed Services Former Spouse's Protection Act (USFSPA), Pub. L. 97-252, 96 Stat. 730, 10 U. S. C. § 1408. That Act, in effect, nullified our decision in *McCarty* and permitted States to treat military retired pay as either the property of the military member or as property of both the member and his spouse. California enacted 1983 Cal. Stats., ch. 775, Cal. Civ. Code Ann. § 5124 (West) (effective up to January 1, 1986). In so doing, the California Legislature declared that California would return to its pre-*McCarty* practice of treating military retired pay as community property.

This case presents the question whether USFSPA is to be given retroactive effect. In other words, is that Act to be read to permit spouses, whose divorce decrees were made final after our decision in *McCarty* but before USFSPA was enacted, to set aside that part of their divorce decrees denying them a share in a military pension because of our holding in *McCarty*. Petitioner in this case attempted to set aside her divorce decree which became final during the period of time between our decision in *McCarty* and enactment of USFSPA. The California Court of Appeal held that USFSPA is not to be given retroactive effect. Other state courts which have considered this question have come to a differ-

ent conclusion. *E. g., Edsall* v. *Superior Court*, 143 Ariz. 240, 693 P. 2d 895 (1984); *Smith* v. *Smith*, 458 A. 2d 711 (Del. Fam. Ct. 1983). Because of this confusion, and because the answer to the question presented turns on an interpretation of a federal statute, I would grant the petition for certiorari.

No. 86–459. COOPER INDUSTRIES, INC. *v.* I. A. M. NATIONAL PENSION FUND BENEFIT PLAN A ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 252 U. S. App. D. C. 189, 789 F. 2d 21.

No. 86–460. MCMAHON ET AL. *v.* MCDOWELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 794 F. 2d 100.

JUSTICE WHITE, dissenting.

In this case the Court of Appeals for the Third Circuit held that certain provisions of the Pennsylvania Wage Payment and Collection Law (WPCL), Pa. Stat. Ann., Title 43, § 260.1 *et seq.* (Purdon 1964 and Supp. 1986), were pre-empted by § 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 897, 29 U. S. C. § 1144(a). 794 F. 2d 100 (1986). The WPCL authorizes an employee to sue his or her employer for wages, fringe benefits, and pension plan contributions. The Court of Appeals reasoned that these provisions could not withstand the preemptive sweep of § 514(a), inasmuch as ERISA establishes a comprehensive mechanism for the recovery of delinquent pension plan contributions, and the petitioner-employees in this case were attempting to avoid this mechanism and "substitute instead a state regulation that circumvents the scheme carefully devised by Congress." 794 F. 2d, at 107. This holding conflicts with the decision in *Sasso* v. *Vachris*, 66 N. Y. 2d 28, 484 N. E. 2d 1359 (1985). In that case, the Court of Appeals of the State of New York held that § 514(a) did not pre-empt N. Y. Bus. Corp. Law § 630 (McKinney 1986), which imposes personal liability upon the 10 largest shareholders of a closely held New York corporation for the payment of pension fund contributions owed its employees. Observing that ERISA also contained remedial provisions for the collection of delinquent contributions, the *Sasso* court stated that these remedies "merely supplement, rather than supersede, existing State remedies . . . ." 66 N. Y. 2d, at 36, 484 N. E. 2d, at 1364. I would grant the petition for certiorari to resolve this conflict.

No. 86-471. COOPER ET AL. *v.* FORSYTH COUNTY HOSPITAL AUTHORITY, INC., ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 789 F. 2d 278.

No. 86-496. VOLKSWAGEN OF AMERICA, INC. *v.* PROTOS. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 797 F. 2d 129.

No. 86-601. MATHES *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 252 U. S. App. D. C. 131, 788 F. 2d 33.

No. 86-5541. MAXWELL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 490 So. 2d 927.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Florida Supreme Court insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would nevertheless grant certiorari because petitioner's Sixth Amendment right to effective assistance of counsel required that he be given access to his trial counsel's work files for use in his state habeas corpus hearing in which he alleged that trial counsel's representation was constitutionally deficient.

I

Petitioner was convicted of murder and sentenced to death after a jury trial. The Supreme Court of Florida affirmed his conviction and sentence on direct appeal. 443 So. 2d 967 (1983). Fol-

lowing the issuance of a death warrant, petitioner sought habeas corpus relief in state court. After a hearing, the habeas petition was denied; the Supreme Court of Florida again affirmed. *Maxwell* v. *Wainwright*, 490 So. 2d 927 (1986).

The petition stated a claim for ineffective assistance of trial counsel, challenging counsel's failure to make certain motions and objections in the course of petitioner's defense. The habeas petition also alleged that trial counsel, engaged in his first attempt to defend a client on capital charges, inadequately investigated petitioner's background in preparation for the penalty phase of the trial. *Id.*, at 932–933.

Prior to the hearing, petitioner's trial counsel refused habeas counsel's informal request to produce work files pertaining to petitioner's defense. Time constraints did not permit habeas counsel to subpoena these materials before filing petitioner's motion for habeas corpus relief.[1] When the trial attorney testified at the hearing, he admitted denying access to the requested files and again refused production. He offered this justification for his refusal:

> "It is my reason and belief that . . . if I'm going to divulge or reveal or to allow people to inspect my files it should be done by court order from either side and the reason for that belief is that I think and believe wholeheartedly that if an attorney who's a trial attorney is preparing his case for trial that if its going to be subject to review a couple of years later it may put a chilling effect on an attorney making notes or work product or whatever have you.
>
> "In other words, that attorney may not be as free to express himself within his own confines of his file and, consequently, until a court orders me to do so and that's determined to be a lawful order, I have refused permission to turn it over to you." App. to Brief in Opposition 19–20.

Habeas counsel then moved to compel production of the trial attorney's entire file. The state court denied this motion "based upon [trial counsel's] rationale." *Id.*, at 20.

Without the file, petitioner was unable to demonstrate the alleged deficiency of trial counsel's representation, particularly with respect to his preparation for the penalty phase of petitioner's trial.

[1] Habeas counsel agreed to represent petitioner on October 30, 1984. The State of Florida had scheduled petitioner's execution for November 7, 1984.

This was due in large part to the attorney's apparent inability to recall important details of his representation. For example:

"Q. Did you obtain a release from Mr. Maxwell to try to take a look at any of [the State's] records?

"A. I don't have any recollection of that.

"Q. So you didn't even obtain a release from Mr. Maxwell?

"A. I didn't say that.

"Q. You said you don't have any recollection?

"A. Exactly.

"Q. Would it be in the file if you had?

"A. You're asking hypothetical questions and I don't know. I make notations on actions that I take in a great majority of times. Sometimes I don't make notations. So it's hard for me to answer that.

"Q. Something like a release of medical information?

"A. That should be in the file.

"Q. Did you try to obtain or review any of Mr. Maxwell's medical records?

"A. I have no recollection of that." *Id.*, at 27–28.

"Q. Other than the motions and memoranda you filed in the court file to the penalty phase, did you prepare any internal memorandum regarding the application of the aggravating and mitigating circumstances to this case?

"A. I had a lot of law or some law—the word 'a lot' is relative—into that case and whether I dictated memorandums or not, I don't remember. If I have them, I have them. If I don't, I don't.

"Q. But again those would be in your file; wouldn't it?

"A. Yes. . . ." *Id.*, at 36.

"Q. Do you recall finding out about any traumatic experiences Mr. Maxwell had?

"A. I may or may not have.

"Q. You may or may not?

"A. I'm sure I dealt in that area though.

"Q. Did you speak with any teachers Mr. Maxwell had?

"A. I have no recollection of doing that at all.

"Q. Ministers?

"A. Now, Joseph Maxwell [petitioner's father] was very religious and I don't remember whether I talked to a minister

or priest or a clergyman in that area or not. I don't specifically remember although it's possible.

"You have to remember it's three years I have not looked at that file and there's just things I don't remember because of the multitude of things that have happened since then.

"Q. I understand. If we had the file, would we be able to find out the answers to some of these questions?

"A. I'm afraid not. In some areas, yes, in some areas, no, because I don't make extensive notes on what I don't do. What I do is make notes on what I do do. And when you're coming from a negative position, I will not necessarily have notes to protect myself. More or less, I don't prepare a case to protect myself.

"So I may not have those kinds of notes. I would have notes as to what I did do." *Id.*, at 44–45.

On appeal to the Florida Supreme Court, petitioner argued that the denial of his requests for access to his trial attorney's files had impaired his due process right to a full and fair evidentiary hearing on his claim of ineffective assistance of counsel. The court rejected this argument with no substantive discussion, holding simply that "the hearing on the motion comported with due process principles." 490 So. 2d, at 932.

II

An essential element of our society's protection of citizens accused of crime is the right to effective assistance of counsel. *Strickland* v. *Washington*, 466 U. S. 668 (1984); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). "Counsel is provided to assist the defendant in presenting his defense, but in order to do so effectively the attorney must work closely with the defendant in formulating defense strategy. . . . Moreover, counsel is likely to have to make a number of crucial decisions throughout the proceedings on a range of subjects that may require consultation with the defendant. These decisions can best be made, and counsel's duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence." *Morris* v. *Slappy*, 461 U. S. 1, 21 (1983) (BRENNAN, J., concurring in result). Counsel's duty to maintain this trust and confidence extends beyond the trial itself. Though he may not continue to represent the defendant following conviction and the disposition of post-trial motions,

he must nevertheless cooperate with defendant's attempts to challenge the conviction or sentence, especially if he possesses unique information about a claim the defendant seeks to raise. Use of this information may be the decisive factor in determining the defendant's failure or success on direct or collateral review.

A defendant's interest in the information in his trial counsel's exclusive possession is of even greater significance when the defendant alleges ineffective assistance by trial counsel. Providing access to such information unquestionably advances the inquiry this Court identified in *Strickland* v. *Washington*, *supra*, at 689, as essential to determining whether counsel has rendered ineffective assistance: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." There is no more accurate or reliable evidence of trial counsel's actual perspective and extent of preparation than the contents of his client's case file. Access to these materials is critical where, as here, trial counsel's testimony rests on little more than vague recollections. Indeed, with respect to petitioner's allegation that his trial attorney did not adequately prepare for the sentencing proceeding, petitioner's need for access to the work files is of paramount importance. Denying access to what may be the most relevant evidence of the adequacy of legal representation is, in this respect, "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment . . . .'" *Caldwell* v. *Mississippi*, 472 U. S. 320, 340 (1985) (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976)).

The courts below erred, in violation of petitioner's Sixth Amendment rights, in accepting trial counsel's reasons for withholding petitioner's files.[2] The right to effective assistance fully encom-

[2]To the extent the Florida courts accepted trial counsel's suggested work-product doctrine, their rulings vastly misconstrue this doctrine's underlying purpose; the privilege to withhold an attorney's work product belongs to *the client*, and in this case petitioner seeks access to files retained by his *own attorney*. Cf. *Spivey* v. *Zant*, 683 F. 2d 881, 885 (CA5 1982) (interpreting Federal Rule of Civil Procedure 26(b)(3)). The attorney's asserted need to ensure that he is "free to express himself" within the confines of a written file is likewise without merit. He seems to claim that if his recorded thoughts are not protected from discovery, he will be less likely to inform himself and

passes the client's right to obtain from trial counsel the work files generated during and pertinent to that client's defense. It further entitles the client to utilize materials contained in these files in any proceeding at which the adequacy of trial counsel's representation may be challenged.[3]

I would grant the petition for certiorari.

Rehearing Denied

No. 86–5354. GEURIN *v.* UNITED STATES, *ante*, p. 888. Petition for rehearing denied.

No. 85–2043. HOFFART *v.* TEXAS, *ante*, p. 824;

No. 85–2135. HARDIN *v.* GILBERT & COLVIN (two cases), *ante*, p. 828;

No. 85–2160. TOWN OF NORWOOD *v.* UNCOMPAHGRE VALLEY WATER USERS ASSN. ET AL., *ante*, p. 829;

No. 85–6572. BOUDREAUX *v.* BLACKBURN, WARDEN, *ante*, p. 830;

No. 85–6883. BUCKMORE *v.* UNITED STATES ET AL., *ante*, p. 833;

No. 85–6916. WILLIAMS *v.* NELLO L. TEER CO. ET AL., *ante*, p. 833;

No. 85–6957. FLOWERS *v.* COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 835;

No. 85–6960. MAXHAM *v.* DEPARTMENT OF THE NAVY, *ante*, p. 835;

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consider along with his client the various defensive strategies that might be available. In other words, he argues that he will be less likely to provide effective assistance of counsel, and yet this is precisely the issue petitioner wishes to investigate. I cannot accept that a lawyer should oppose the disclosure of recorded thoughts that do not evidence ineffective assistance; nor can I accept that petitioner's Sixth Amendment rights do not prevail over his lawyer's asserted privacy interests where that lawyer's recorded thoughts may reflect that ineffective assistance has in fact been rendered.

[3] Though States are not constitutionally required to establish avenues for seeking postconviction relief from an erroneous conviction, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts* v. *Lucey*, 469 U. S. 387, 401 (1985).

No. 85–7025. HOLLINS *v.* HENKEL, *ante*, p. 837;

No. 85–7035. TRAUNIG *v.* VETERANS ADMINISTRATION, *ante*, p. 837;

No. 85–7064. COMSIA *v.* BURKHART ET UX., *ante*, p. 839;

No. 85–7098. IN RE NELSON, *ante*, p. 810;

No. 85–7109. SIMMONS *v.* DEPARTMENT OF THE NAVY, *ante*, p. 841;

No. 85–7172. SKINNER *v.* UNITED STATES, *ante*, p. 844;

No. 85–7181. LEE *v.* HARDAGE ET AL., *ante*, p. 845;

No. 85–7222. COLLIER *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON, ET AL., *ante*, p. 846;

No. 85–7224. PICCIANDRA *v.* UNITED STATES, *ante*, p. 847;

No. 86–35. POLYAK *v.* HULEN ET AL. (two cases), *ante*, p. 803;

No. 86–5052. WILKINS *v.* KANE ET AL., *ante*, p. 858;

No. 86–5056. JOHL *v.* JOHL ET AL., *ante*, p. 858;

No. 86–5217. IN RE MEADOWS, *ante*, p. 810;

No. 86–5225. DAVIS *v.* CHILDREN'S HOSPITAL OF NORTHERN CALIFORNIA ET AL., *ante*, p. 866; and

No. 86–5258. ISHIHARA *v.* UNITED STATES, *ante*, p. 867. Petitions for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of these petitions.

NOVEMBER 19, 1986

Miscellaneous Order

No. A–386. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* BUNDY. Application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE POWELL, and by him referred to the Court, denied.

NOVEMBER 26, 1986

Dismissals Under Rule 53

No. 86–5571. MELENDEZ-CARRION ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 790 F. 2d 984.

No. 86–5607. BERRIOS-BERRIOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 791 F. 2d 246.

NOVEMBER 28, 1986

Dismissal Under Rule 53

No. 86-451. SOHIO ALASKA PETROLEUM CO. *v.* CIBRO PETROLEUM PRODUCTS, INC. Temp. Emerg. Ct. App. Certiorari dismissed under this Court's Rule 53. Reported below: 798 F. 2d 1421.

DECEMBER 1, 1986

Appeals Dismissed

No. 86-94. PIPKIN *v.* COLORADO. Appeal from Dist. Ct. Colo., Arapahoe County, dismissed for want of substantial federal question.

No. 86-5618. FRANKLIN *v.* TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 714 S. W. 2d 252.

No. 86-571. MENDONCA *v.* OREGON. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 77 Ore. App. 195, 712 P. 2d 186.

No. 86-586. HUDSON *v.* EDGETT ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86-5587. PRENZLER *v.* JONES ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86-5609. STEVENSON *v.* ELUA. Appeal from Sup. Ct. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86-5633. SEITU *v.* CITY OF JACKSON, MISSISSIPPI, ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 788 F. 2d 1563.

No. 86-612. PRUDENTIAL FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* FLANIGAN. Appeal from Sup. Ct. Mont. dismissed for want of properly presented federal question. Reported below: 221 Mont. 419, 720 P. 2d 257.

No. 86-5642. PETERSEN *v.* ATLANTIC GULF & PACIFIC CO. ET AL. Appeal from D. C. S. D. Tex. dismissed for want of jurisdiction.

Vacated and Remanded on Appeal

No. 85-1773. OBERLY, ATTORNEY GENERAL OF DELAWARE, ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. Appeal from C. A. 3d Cir. Judgment vacated and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his brief as *amicus curiae* filed November 10, 1986. THE CHIEF JUSTICE would note probable jurisdiction and set case for oral argument. Reported below: 782 F. 2d 29.

Miscellaneous Orders

No. D-563. IN RE DISBARMENT OF JAMES. Disbarment entered. [For earlier order herein, see 478 U. S. 1034.]

No. D-565. IN RE DISBARMENT OF MCCLOSKEY. Disbarment entered. [For earlier order herein, see 478 U. S. 1037.]

No. 85-792. INTERSTATE COMMERCE COMMISSION *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.; and

No. 85-793. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. C. A. D. C. Cir. [Certiorari granted, 475 U. S. 1081.] Counsel for the parties are invited to file supplemental briefs, not to exceed 10 pages in length (15 pages if filed on behalf of both petitioners or both respondents), limited to the following question: "In view of 28 U. S. C. § 2344, 49 U. S. C. § 10327(i), and the passage of more than 60 days between (1) respondents' appeals from the Interstate Commerce Commission's October 25, 1983, order, declining to reconsider its May 18, 1983, order regarding respondent Brotherhood of Locomotive Engineers' motion for clarification, and (2) service of the Commission's May 18, 1983, clarification order, did the appeals properly bring before the reviewing court the May 18, 1983, order?" Briefs may be submitted no later than December 22, 1986.

No. 85-2067. UNITED STATES *v.* MENDOZA-LOPEZ ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 811.] Motion for appointment of counsel granted, and it is ordered that Kathy Goudy, of Lincoln, Neb., be appointed to serve as counsel for respondents in this case.

No. 85-6461. MARTIN *v.* OHIO. Sup. Ct. Ohio. [Certiorari granted, 475 U. S. 1119.] Motion of respondent to strike reply brief denied.

No. 86-6. RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMSON. C. A. 9th Cir. [Certiorari granted, *ante*, p. 812.] Motion of respondent to disqualify petitioner's counsel denied.

No. 86-5082. WRENN *v.* OHIO DEPARTMENT OF MENTAL HEALTH ET AL., *ante*, p. 809. Motion of petitioner to reconsider the order denying leave to proceed *in forma pauperis* denied. JUSTICE SCALIA took no part in the consideration or decision of this motion.

No. 86-5596. WRENN *v.* MISSOURI. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 22, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86-5740. ORPINUK *v.* UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 22, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari

without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86–5592. IN RE FILIPAS;
No. 86–5612. IN RE HJELTER; and
No. 86–5675. IN RE JAMES. Petitions for writs of mandamus denied.

No. 86–692. IN RE REAL. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 86–566. PERRY ET AL. *v.* THOMAS. Appeal from Ct. App. Cal., 2d App. Dist. Probable jurisdiction noted.

No. 86–231. PENSION BENEFIT GUARANTY CORPORATION *v.* YAHN & MCDONNELL, INC., ET AL.; and
No. 86–253. UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN ET AL. *v.* YAHN & MCDONNELL, INC., ET AL. Appeals from C. A. 3d Cir. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE WHITE took no part in the consideration or decision of these cases. Reported below: 787 F. 2d 128.

Certiorari Granted

No. 86–260. SOUTH DAKOTA *v.* DOLE, SECRETARY OF TRANSPORTATION. C. A. 8th Cir. Certiorari granted. Reported below: 791 F. 2d 628.

No. 86–319. VAN DRASEK *v.* LEHMAN, SECRETARY OF THE NAVY, ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 790 F. 2d 90.

No. 86–381. CALIFORNIA *v.* SUPERIOR COURT OF CALIFORNIA, SAN BERNARDINO COUNTY (SMOLIN ET AL., REAL PARTIES IN INTEREST). Sup. Ct. Cal. Certiorari granted. Reported below: 41 Cal. 3d 758, 716 P. 2d 991.

No. 85–1626. GOODMAN ET AL. *v.* LUKENS STEEL CO. ET AL.; and
No. 85–2010. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. *v.* GOODMAN ET AL. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 777 F. 2d 113.

No. 85-2064. GREER, WARDEN *v.* MILLER. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 789 F. 2d 438.

No. 86-322. CRAWFORD FITTING CO. ET AL. *v.* J. T. GIBBONS, INC.; and

No. 86-328. CHAMPION INTERNATIONAL CORP. *v.* INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, CLC, ET AL. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 86-322, 790 F. 2d 1193; No. 86-328, 790 F. 2d 1174.

No. 86-497. AGENCY HOLDING CORP. ET AL. *v.* MALLEY-DUFF & ASSOCIATES, INC.; and

No. 86-531. CROWN LIFE INSURANCE CO. ET AL. *v.* MALLEY-DUFF & ASSOCIATES, INC., ET AL. C. A. 3d Cir. Certiorari granted in No. 86-497. Certiorari granted in No. 86-531 limited to Questions I and II presented by the petition. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 792 F. 2d 341.

Certiorari Denied. (See also Nos. 86-571, 86-586, 86-5587, 86-5609, and 86-5633, *supra.*)

No. 85-1976. DYKES ET AL. *v.* DYKES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 1000.

No. 85-2002. J. YOUNG & CO., INC. *v.* M/V BOB LIVINGSTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1112.

No. 85-2123. HUCKABY *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 85-2155. ANDERSON *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 325.

No. 85-6973. DIXON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 593.

No. 85-6978. MURPHY *v.* ALLSBROOK, SUPERINTENDENT, ODOM CORRECTIONAL COMPLEX, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 900.

No. 85-7129. WEST *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 485 So. 2d 681.

No. 85-7171. VOGEL *v.* NICKS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 594.

No. 86-58. FRED S. JAMES & CO. OF TEXAS, INC. *v.* EQUILEASE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 598.

No. 86-142. CITY OF MONTGOMERY ET AL. *v.* BENJAMIN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 959.

No. 86-151. NEW YORK *v.* MATTISON. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 462, 494 N. E. 2d 1374.

No. 86-241. FIELDS ET AL. *v.* ROCKDALE COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 1558.

No. 86-254. BETHLEHEM STEEL CORP. *v.* PEMBERTON; and
No. 86-444. PEMBERTON *v.* BETHLEHEM STEEL CORP. Ct. Sp. App. Md. Certiorari denied. Reported below: 66 Md. App. 133, 502 A. 2d 1101.

No. 86-271. HOLLOWAY *v.* WALKER, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1287.

No. 86-275. BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. *v.* STEIN; and
No. 86-533. STEIN *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 13.

No. 86-285. DOYLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1440.

No. 86-294. PERDUE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 203.

No. 86-330. LE BEAU *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1015.

No. 86-334. ENSIGN ELECTRIC DIVISION OF HARVEY HUBBELL INC. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 1100 and 783 F. 2d 1121.

No. 86-345. THREE WAY CORP. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 253 U. S. App. D. C. 164, 792 F. 2d 232.

No. 86-347. GRASSI ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 1572.

No. 86-365. STANKO ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 793 F. 2d 232.

No. 86-370. BRENNAN *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 787 F. 2d 1559.

No. 86-377. CARVAJAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 682.

No. 86-384. SVETANOFF *v.* MCMILLIAN. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 149.

No. 86-397. CHURCH OF ST. PAUL AND ST. ANDREW *v.* BARWICK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 510, 496 N. E. 2d 183.

No. 86-411. OTLOWSKI, MAYOR OF PERTH AMBOY, ET AL. *v.* KEAN, GOVERNOR OF NEW JERSEY, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86-420. LANG *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 792 F. 2d 1235.

No. 86-501. GARRIES *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 288.

No. 86-521. DISALVO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 922.

No. 86-530. KELLERMYER ET AL. *v.* BLUE FLAME GAS CORP. ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 797 F. 2d 983.

No. 86-539. TORRENCE *v.* OXFORD MUNICIPAL SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 1289.

No. 86-544. KENNEDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 540.

No. 86-545. DUNCAN ET AL. *v.* VILLAGE OF MIDDLEFIELD, OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 23 Ohio St. 3d 83, 491 N. E. 2d 692.

No. 86-549. THOMPSON, DBA LIBERTY SUPERMARKET NO. 29 *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 792 F. 2d 1119.

No. 86-552. HUBBARD BROADCASTING, INC. *v.* METROPOLITAN SPORTS FACILITIES COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 797 F. 2d 552.

No. 86-555. INTERNATIONAL FRUIT PRODUCTS CO., INC., ET AL. *v.* BRYANT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 118.

No. 86-557. SCOTT *v.* GREENBERG, EXECUTRIX OF THE ESTATE OF BARNETT, ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 86-560. ODUM *v.* UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 92.

No. 86-573. TUN ET UX. *v.* KAUIKEOLANI CHILDREN'S HOSPITAL ET AL. Sup. Ct. Haw. Certiorari denied.

No. 86-574. CITY OF SCOTTSDALE *v.* CORRIGAN. Ct. App. Ariz. Certiorari denied. Reported below: 149 Ariz. 553, 720 P. 2d 528.

No. 86-576. SHOEMAKER ET AL. *v.* HANDEL, EXECUTIVE DIRECTOR OF THE NEW JERSEY RACING COMMISSION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 795 F. 2d 1136.

No. 86-577. CALIFORNIA PACIFIC RESEARCH, INC. *v.* UNITED STATES POSTAL SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 682.

No. 86-579. FEUERER *v.* ADAMAR OF NEW JERSEY, INC. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1132.

No. 86-580. TUCKER ET AL. *v.* WHITAKER TRAVEL, LTD., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1140.

No. 86–583. AUSTIN ET AL. *v.* LEXINGTON INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 794 F. 2d 941.

No. 86–585. ALLEN ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Orange County. Certiorari denied.

No. 86–588. AETNA CASUALTY & SURETY CO. *v.* SMITH PLUMBING, INC., DBA WHITE MOUNTAIN SUPPLY CO. Sup. Ct. Ariz. Certiorari denied. Reported below: 149 Ariz. 524, 720 P. 2d 499.

No. 86–590. UNIVERSAL CITY STUDIOS, INC. *v.* NINTENDO CO., LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 797 F. 2d 70.

No. 86–593. NOWELL, THROUGH HIS MOTHER AND NEXT FRIEND, NOWELL, ET AL. *v.* UNIVERSAL ELECTRICAL CO. C. A. 5th Cir. Certiorari denied. Reported below: 792 F. 2d 1310.

No. 86–598. RAND ET AL. *v.* ANACONDA-ERICSSON, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 843.

No. 86–599. SPIEGEL *v.* CONTINENTAL ILLINOIS NATIONAL BANK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 790 F. 2d 638.

No. 86–600. ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK ET AL. *v.* STERLING ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 793 F. 2d 52 and 795 F. 2d 8.

No. 86–633. POTISOPHON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1416.

No. 86–650. ROBINSON *v.* KENTUCKY. Cir. Ct. Ky., Campbell County. Certiorari denied.

No. 86–653. RENNA *v.* CITY COUNCIL OF THE CITY OF SARATOGA, CALIFORNIA, ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 86–655. GOULD *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. C. A. 9th Cir. Certiorari denied. Reported below: 790 F. 2d 769.

No. 86-677. SEARS, ROEBUCK & CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 777.

No. 86-698. IMANI, ON BEHALF OF HAYES *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 508.

No. 86-705. WILSON *v.* TURNAGE, DIRECTOR, SELECTIVE SERVICE SYSTEM. C. A. Fed. Cir. Certiorari denied. Reported below: 791 F. 2d 151.

No. 86-706. AGATE ET AL. *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1413.

No. 86-708. BURWELL *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 253 U. S. App. D. C. 39, 791 F. 2d 210.

No. 86-721. PRAGER *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 730.

No. 86-722. HOWARD *v.* MARSH, SECRETARY OF THE ARMY. C. A. 8th Cir. Certiorari denied. Reported below: 785 F. 2d 645.

No. 86-5001. COUCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 931.

No. 86-5013. GARCES ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 86-5033. BORNING *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 481 So. 2d 1330.

No. 86-5121. HOLBROOK *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 86-5134. MOSIER *v.* MURPHY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 790 F. 2d 62.

No. 86-5143. ROBERTS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 86–5184. SCROGGINS *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 110 Idaho 380, 716 P. 2d 1152.

No. 86–5235. JOHNSON *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86–5242. VELLEFF *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 102 Nev. 753.

No. 86–5257. CRAWFORD *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 256 Ga. 57, 344 S. E. 2d 215.

No. 86–5273. VAUGHN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 199 Conn. 557, 508 A. 2d 430.

No. 86–5274. BAGLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 759.

No. 86–5276. KELTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 791 F. 2d 101.

No. 86–5287. FRY *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 131 Wis. 2d 153, 388 N. W. 2d 565.

No. 86–5289. PLUMMER ET UX. *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC ASSISTANCE ET AL. C. A. 3d Cir. Certiorari before judgment denied.

No. 86–5296. OWENS *v.* MAGUIRE. C. A. 3d Cir. Certiorari denied.

No. 86–5320. MILLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 86–5337. ADKINS *v.* GREER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 791 F. 2d 590.

No. 86–5341. CARTER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 131 Wis. 2d 69, 389 N. W. 2d 1.

No. 86–5364. SANCHEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 790 F. 2d 245.

No. 86–5365. HEYMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 788.

No. 86–5368. MILLER *v.* NEUBERT, SUPERINTENDENT, LEESBURG STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 796 F. 2d 598.

No. 86–5389. YOUNG ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 1064.

No. 86–5393. PRENZLER *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 9th Cir. Certiorari denied.

No. 86–5394. MERKEL ET AL. *v.* SCOVILL, INC. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 174.

No. 86–5395. SCALF *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86–5431. MARTIN *v.* SEARS, ROEBUCK & CO. C. A. 10th Cir. Certiorari denied.

No. 86–5445. KRAISELBURD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1395.

No. 86–5455. KENNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 789 F. 2d 783.

No. 86–5470. LACHMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 86–5495. JONES *v.* REIDEY ET AL. C. A. D. C. Cir. Certiorari denied.

No. 86–5527. HAWTHORNE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 86–5539. EKBLAD *v.* SHABAZ ET AL. C. A. 7th Cir. Certiorari denied.

No. 86–5582. WEBER *v.* STRAM. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–5586. SCHLICHER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied.

No. 86–5588. PHILLIPS *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied.

No. 86–5589. TAYLOR *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 802 F. 2d 448.

No. 86-5594. WRIGHT *v.* FIRESTONE TIRE & RUBBER CO. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 1419.

No. 86-5595. POPE *v.* JOLIET FEDERAL SAVINGS & LOAN ASSN. ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 138 Ill. App. 3d 1167, 502 N. E. 2d 876.

No. 86-5597. BECKER *v.* SUFFOLK COUNTY LEGAL AID DIVISION. C. A. 2d Cir. Certiorari denied.

No. 86-5604. RIVERA *v.* FRANZEN, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 794 F. 2d 314.

No. 86-5605. BECKER *v.* ARCADIAN GARDENS. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 78.

No. 86-5606. BECKER *v.* HENRY MODELLS & CO., INC. C. A. 2d Cir. Certiorari denied.

No. 86-5608. DALTON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 514 A. 2d 413.

No. 86-5613. ERWIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 656.

No. 86-5619. ADELMAN *v.* GRAVES. C. A. 5th Cir. Certiorari denied.

No. 86-5622. WOJTCZAK *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 86-5623. PINTE *v.* RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 86-5625. PEARSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 867.

No. 86-5626. CARTER *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 931.

No. 86-5634. SMITH *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 239 Kan. 695.

No. 86-5635. O'BRIAIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86-5636. MITCHELL *v.* VARIOUS AGENCIES OF THE FEDERAL AND STATE GOVERNMENTS. Sup. Ct. N. M. Certiorari denied.

No. 86-5637. KOENIG *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 680.

No. 86-5638. MCCOY *v.* CLERK OF COURT OF DARLINGTON COUNTY ET AL. Sup. Ct. S. C. Certiorari denied.

No. 86-5640. TAYLOR *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 86-5641. WILLIAMS *v.* UNION CARBIDE CORP. C. A. 6th Cir. Certiorari denied. Reported below: 790 F. 2d 552.

No. 86-5645. GILCES *v.* JONES. C. A. 2d Cir. Certiorari denied.

No. 86-5646. COLEMAN *v.* DELAWARE ET AL. C. A. 3d Cir. Certiorari denied.

No. 86-5647. BERCAW *v.* MANDAK, JUDGE. C. A. 3d Cir. Certiorari denied.

No. 86-5650. SLATER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 1563.

No. 86-5651. HOPPER *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 489 N. E. 2d 1209.

No. 86-5660. DAVIS *v.* ROBBS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 794 F. 2d 1129.

No. 86-5661. KENNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 796 F. 2d 480.

No. 86-5662. GARCIA *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 86-5663. MURILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 683.

No. 86-5665. MYRICK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 504 A. 2d 580.

No. 86–5668. MALAVE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 801 F. 2d 1343.

No. 86–5669. TODDY-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 797 F. 2d 976.

No. 86–5671. FORD *v.* BURROUGHS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1133.

No. 86–5676. MCKNIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1141.

No. 86–5687. LYNCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1416.

No. 86–5689. COLLATOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 798 F. 2d 18.

No. 86–5690. BROWNSCOMBE *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 468.

No. 86–5692. MALLORY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 798 F. 2d 473.

No. 86–5700. JOHNSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 67 Md. App. 347, 507 A. 2d 1134.

No. 86–5704. GOODACRE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 793 F. 2d 1124.

No. 86–5705. GARRIS *v.* LINDSAY, ADMINISTRATOR, MAXIMUM SECURITY FACILITY AT LORTON, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 254 U. S. App. D. C. 13, 794 F. 2d 722.

No. 86–5709. KINNELL *v.* UNITED STATES DISTRICT COURT JUDGES ET AL. C. A. 10th Cir. Certiorari denied.

No. 86–5728. CEBAS-BRUNO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 792 F. 2d 1125.

No. 86–5737. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 798 F. 2d 1409.

No. 86–5742. WASHINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 798 F. 2d 473.

No. 86–5761. BRATTON-BEY *v.* COMPTROLLER OF THE TREASURY. Ct. Sp. App. Md. Certiorari denied. Reported below: 67 Md. App. 759.

No. 86–5768. OSGOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 794 F. 2d 1087.

No. 85–1821. UTAH ET AL. *v.* UTE INDIAN TRIBE. C. A. 10th Cir. Motion of Santa Fe Mining, Inc., for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to file supplemental memorandum as *amicus curiae* granted. Certiorari denied. Reported below: 773 F. 2d 1087.

No. 86–72. R. L. PAYNE CO., INC. *v.* MALQUIST ET AL. Sup. Ct. Mont. Motion of respondent Dale H. Malquist for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 220 Mont. 176, 714 P. 2d 995.

No. 86–173. HARRIS *v.* ATTORNEY GENERAL OF VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 792 F. 2d 139.

No. 86–602. PEARSON TRUCKING & RIGGING, INC. *v.* HICKS, DBA HICKS ENGINEERING CO. Sup. Ct. Nev. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 102 Nev. 331, 720 P. 2d 1229.

No. 86–218. WALKER ET AL. *v.* ROWE ET AL. C. A. 7th Cir. Motion of Sam Bivins et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 791 F. 2d 507.

No. 86–250. BOWEN, WARDEN, ET AL. *v.* PEOPLES. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 791 F. 2d 861.

No. 86–553. CONNECTICUT *v.* WHELAN. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 200 Conn. 743, 513 A. 2d 86.

No. 86–584. CALIFORNIA *v.* TYBERG. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 86-277. WALKER *v.* ILLINOIS. Sup. Ct. Ill.;
No. 86-5453. TICHNELL *v.* MARYLAND. Ct. App. Md.;
No. 86-5617. SPAZIANO *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;
No. 86-5631. NEWSTED *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 86-5639. MAGWOOD *v.* ALABAMA. Ct. Crim. App. Ala.;
No. 86-5644. MAK *v.* WASHINGTON. Sup. Ct. Wash.;
No. 86-5683. WALKER *v.* OKLAHOMA. Ct. Crim. App. Okla.; and
No. 86-5686. ROGERS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 86-277, 109 Ill. 2d 484, 488 N. E. 2d 529; No. 86-5453, 306 Md. 428, 509 A. 2d 1179; No. 86-5617, 489 So. 2d 720; No. 86-5631, 720 P. 2d 734; No. 86-5639, 494 So. 2d 124; No. 86-5644, 105 Wash. 2d 692, 718 P. 2d 407; No. 86-5683, 723 P. 2d 273; No. 86-5686, 256 Ga. 140, 344 S. E. 2d 644.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 86-336. LINNAS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would grant certiorari. Reported below: 790 F. 2d 1024.

No. 86-490. COMMISSIONER OF INTERNAL REVENUE *v.* ILLINOIS CEREAL MILLS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 789 F. 2d 1234.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

This case presents the question whether any portion of the cost of a factory's electrical system qualifies for the investment tax credit under § 38 of the Internal Revenue Code, 26 U. S. C. § 38, and if so, what portion. The Code defines "section 38 property" to include "tangible personal property" and "other tangible property," such as industrial machinery, but to exclude "a building and its structural components." 26 U. S. C. §§ 48(a)(1)(A), (B). In this case, the Court of Appeals for the Seventh Circuit held that the cost of installation of a factory's electrical distribution system

must be allocated between "section 38 property" and "non-section 38 property" according to a ratio by which electrical usage is divided between the operation of machinery, on the one hand, and ordinary building maintenance, like lighting and climate control, on the other. 789 F. 2d 1234 (1986). As applied to the facts before it, this interpretation resulted in qualification for the investment tax credit of 95% of the cost of the factory's electrical system. The Court of Appeals adopted this theory of allocation from the Tax Court's decision in *Scott Paper Co.* v. *Commissioner*, 74 T. C. 137, 182–187 (1980). The Fourth Circuit in *A. C. Monk & Co.* v. *United States*, 686 F. 2d 1058, 1065–1066 (1982), rejected the allocation method adopted by the Tax Court in *Scott Paper* and held that an electrical system can qualify for the credit only if it is so "inextricably linked to the present, specific machinery" that it cannot "be reasonably adapted in the present building to more general uses." If a manufacturer converting the building to another use would be able, with reasonable alterations, to use the existing system, the system is a structural component; if the existing system essentially would have to be scrapped, it qualifies for the investment tax credit. The issue involves many other taxpayers, and I would grant certiorari to resolve this conflict.

No. 86–547. BROWNING *v.* CLERK, UNITED STATES HOUSE OF REPRESENTATIVES, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 252 U. S. App. D. C. 241, 789 F. 2d 923.

No. 86–5598. BROWN *v.* JUST ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition.

No. 86–5610. THOMAS *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 796 F. 2d 1322.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The United States Court of Appeals for the Eleventh Circuit held below that petitioner's Sixth Amendment right to the assistance of counsel was not violated when he was refused counsel at his preliminary hearing on a capital murder charge, because the denial of counsel at the preliminary hearing was harmless error.

I

Petitioner Donald Wayne Thomas was convicted of murder and sentenced to death after jury trial. The State of Georgia charged petitioner, who was then 19 years old, with the murder of a 9-year-old boy. At the preliminary hearing 10 days after petitioner's arrest, petitioner requested an opportunity to retain private counsel, indicating that he did not wish to be represented by the public defender. The court denied petitioner's request, excused the public defender, and held the preliminary hearing in the absence of any defense counsel. The State's main witness, a 15-year-old mentally retarded girl, then testified without cross-examination that petitioner had told her he had committed the murder, and had shown her the body. This testimony differed in various material respects from the later testimony given by this witness at trial.

On direct appeal from petitioner's subsequent conviction, the Georgia Supreme Court affirmed the conviction and sentence. *Thomas* v. *State*, 245 Ga. 688, 266 S. E. 2d 499 (1980). This Court granted certiorari, vacated the sentence of death, and remanded for reconsideration in light of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). *Thomas* v. *Georgia*, 449 U. S. 988 (1980). On remand, the Georgia Supreme Court reinstated the death sentence, without benefit of further briefing or oral argument. *Thomas* v. *State*, 247 Ga. 233, 275 S. E. 2d 318, cert. denied, 452 U. S. 973 (1981). Having exhausted in state postconviction proceedings claims of ineffective assistance of counsel and prosecutorial misconduct at the sentencing phase of the trial, petitioner's counsel brought a federal habeas corpus action raising those issues.

During the pendency of the federal petition, counsel, who had not represented petitioner at trial, first discovered the preliminary hearing transcript in the files of the public defender's office, and realized that petitioner had been denied counsel at his preliminary hearing. Counsel notified the District Court that Thomas would move to amend his federal habeas petition as soon as the new claim could be presented to the state courts for exhaustion. Relief on this claim was denied in new state proceedings, and petitioner's counsel moved to amend the federal petition. The District Court vacated petitioner's death sentence on the ground that petitioner had not received effective assistance of counsel at the sentencing phase of his trial, but denied the motion to amend the petition as untimely. As an alternative ground of decision, the District Court also held that even if the claim were timely pre-

sented, the denial of counsel at the preliminary hearing had been harmless error.

Both parties appealed from the District Court's order. The Court of Appeals affirmed. 796 F. 2d 1322 (1986). On the denial-of-counsel claim, the Court of Appeals adopted the District Court's alternative ground, holding that "[t]he prosecution has carried its burden of persuading this Court that, even if constitutional error was established, the error was harmless." *Id.*, at 1326. Finding that "Thomas' [trial] counsel had access to the transcript of the preliminary hearing," "knew the nature of the State's case," and "sought and received early psychiatric examinations and evaluations on Thomas," the Court of Appeals concluded that "Thomas was not prejudiced by his counsel's absence at the preliminary hearing." *Id.*, at 1327.

II

It has been settled for more than half a century that a defendant facing capital charges is entitled to the assistance of counsel. *Powell* v. *Alabama*, 287 U. S. 45 (1932). The right to counsel, it was then recognized, is not merely a right to trial counsel, but a right to the assistance of counsel in preparing a defense throughout the period from arraignment to trial; defendants are "as much entitled to such aid during that period as at the trial itself." *Id.*, at 57. Our recognition of the right to counsel has substantially increased in the period since *Powell* was decided. See, *e. g.*, *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). It is astonishing to me that the Court of Appeals so readily determined, despite our repeated holdings to the contrary, that it is not *per se* constitutional error to deny the assistance of counsel to a defendant whose life the State intends to take.

In support of its conclusion that the denial of counsel in the preliminary hearing of a capital prosecution can be harmless error, the Court of Appeals relied upon *Coleman* v. *Alabama*, 399 U. S. 1 (1970), in which this Court remanded for consideration of harmless error under *Chapman* v. *California*, 386 U. S. 18 (1967), the denial of counsel at a preliminary hearing. This reliance is fundamentally misplaced, for *Coleman* was not a capital case. As Chief Justice Burger stated for the Court in *Holloway* v. *Arkan-*

sas, 435 U. S. 475, 489 (1978), "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic."*

Our recent cases make clear that, contrary to the Court of Appeals' conclusion below, denial of counsel at any critical stage of a criminal prosecution is *per se* constitutional error. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland* v. *Washington*, 466 U. S. 668, 692 (1984). "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States* v. *Cronic*, 466 U. S. 648, 659 (1984) (footnote omitted). Petitioner's capital trial was unfair for precisely this reason. The Court of Appeals' casual conclusion that "[c]ounsel could not have revealed defects in the State's case so great that the magistrate would have refused to bind the petitioner over to the State's custody," 796 F. 2d, at 1327, is nothing more than speculation of a kind which the Constitution will not countenance. Mere recitation of the words "harmless error" is not a constitutionally sufficient basis on which to permit the State to deny the assistance of any lawyer at all to a defendant against whom the State is seeking the death penalty.

I dissent from the denial of the petition for certiorari.

Rehearing Denied

No. 85–7189. WILEY *v.* MISSISSIPPI, *ante*, p. 906;

No. 86–236. MARENO *v.* ROBERTS, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK, *ante*, p. 878;

No. 86–278. JENSEN *v.* UNITED STATES, *ante*, p. 924;

No. 86–5316. VESAY *v.* UNITED STATES, *ante*, p. 887;

No. 86–5319. GIBSON *v.* KIVETT ET AL., *ante*, p. 887;

No. 86–5327. GILREATH *v.* KEMP, WARDEN, *ante*, p. 890; and

No. 86–5346. MIESBAUER *v.* KANSAS, *ante*, p. 888. Petitions for rehearing denied.

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*It is not open to question that the preliminary hearing held below was a "critical stage" in petitioner's prosecution. See *Coleman* v. *Alabama*, 399 U. S. 1, 9–10 (1970).

No. 86-5384. BONIN *v.* T. L. JAMES & CO., INC., ET AL., *ante*, p. 888;

No. 86-5427. MAK *v.* UNITED STATES, *ante*, p. 889; and

No. 86-5550. IN RE DIXON, *ante*, p. 913. Petitions for rehearing denied.

No. 85-1535. VEREZ ET AL. *v.* VIRGINIA, *ante*, p. 813;

No. 85-1854. BANKS *v.* FINLEY-SELIGMAN & LATZ, INC., *ante*, p. 816;

No. 85-1856. JAYCO SYSTEMS, INC. *v.* SAVIN BUSINESS MACHINES CORP., *ante*, p. 816;

No. 85-1960. DURDEN *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante*, p. 820;

No. 85-1975. POLYAK *v.* HULEN ET AL., *ante*, p. 821;

No. 85-1991. IN RE POLYAK, *ante*, p. 810;

No. 85-2018. KUNGLE *v.* ST. JOHN'S COLLEGE ET AL., *ante*, p. 822;

No. 85-2059. WINSLOW *v.* BOARD OF MORGAN COUNTY COMMISSIONERS, *ante*, p. 825;

No. 85-2112. LODI TRUCK SERVICE, INC. *v.* DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA, *ante*, p. 801;

No. 85-2132. KEHOE *v.* HOFMANN, *ante*, p. 828;

No. 85-2165. DAMASCUS *v.* PACIFIC BELL CO. ET AL., *ante*, p. 830;

No. 85-6844. PULLEY *v.* SCOTT ET AL., *ante*, p. 803;

No. 85-6890. BUELL *v.* OHIO, *ante*, p. 871;

No. 85-6897. CLARK *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, *ante*, p. 833;

No. 85-6937. MAY *v.* INTERNATIONAL BUSINESS ASSOCIATES, INC., ET AL., *ante*, p. 834;

No. 85-6941. BASALYGA *v.* PENNSYLVANIA, *ante*, p. 834;

No. 85-7007. FINNAN *v.* FINNAN ET AL., *ante*, p. 836;

No. 85-7017. COOK *v.* GEORGIA, *ante*, p. 871;

No. 85-7042. EITEL *v.* BALDWIN, *ante*, p. 838;

No. 85-7065. JACKSON *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, *ante*, p. 839;

No. 85-7070. BYRNE *v.* LOUISIANA, *ante*, p. 871;

No. 85-7135. COLLIER *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON, *ante*, p. 842;

No. 85–7141. WARD *v.* LOUISIANA, *ante*, p. 871;
No. 85–7165. GRANDISON *v.* MARYLAND, *ante*, p. 873;
No. 85–7192. GOODRICH *v.* BANK OF AMERICA ET AL., *ante*, p. 845;
No. 85–7199. WALKER *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK, *ante*, p. 845;
No. 85–7215. IN RE WENDT, *ante*, p. 810;
No. 86–14. BUCKLEY *v.* PENNSYLVANIA, *ante*, p. 802;
No. 86–15. DEVINE *v.* UNITED STATES, *ante*, p. 848;
No. 86–56. SHOECRAFT *v.* CATHOLIC SOCIAL SERVICES BUREAU, INC., ET AL., *ante*, p. 805;
No. 86–128. FLORENCE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 851;
No. 86–182. POLYAK *v.* BUFORD EVANS & SONS, *ante*, p. 804;
No. 86–235. BELL *v.* NEW YORK ET AL., *ante*, p. 854;
No. 86–242. SMITH *v.* DEPARTMENT OF THE AIR FORCE, *ante*, p. 854;
No. 86–5041. VALWAY ET UX. *v.* KEARNS ET AL., *ante*, p. 857;
No. 86–5083. WRIGHT *v.* YACKLEY, *ante*, p. 859;
No. 86–5086. PETRIC *v.* MARYLAND, *ante*, p. 860;
No. 86–5097. JENSON *v.* MCDOUGALD, *ante*, p. 860;
No. 86–5156. MAY *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL., *ante*, p. 863;
No. 86–5157. HARVARD *v.* FLORIDA, *ante*, p. 863;
No. 86–5160. FEWELL *v.* FEWELL, *ante*, p. 863;
No. 86–5206. FREE *v.* ILLINOIS, *ante*, p. 871; and
No. 86–5233. DUVALLON *v.* FLORIDA, *ante*, p. 866. Petitions for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of these petitions.

DECEMBER 3, 1986

Miscellaneous Order

No. A–426. EVANS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

DECEMBER 4, 1986

Assignment Order

Pursuant to the authority conferred by the Constitution and Statutes of the United States, and more particularly by 28 U. S. C. § 42, the Court hereby assigns and allots ASSOCIATE JUSTICE ANTONIN SCALIA as Circuit Justice for the District of Columbia Circuit for the day of December 5, 1986.

DECEMBER 8, 1986

Appeals Dismissed

No. 85-2147. DOE ET AL. *v.* LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ET AL. Appeal from Ct. App. La., 4th Cir., dismissed for want of substantial federal question. Reported below: 479 So. 2d 369.

No. 86-610. BREAUX, ATTORNEY FOR BOSWELL *v.* ALLIED BANK OF TEXAS. Appeal from Ct. App. Tex., 14th Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 699 S. W. 2d 599.

No. 86-618. HILST *v.* GRIMES, INSURANCE COMMISSIONER OF OKLAHOMA. Appeal from Ct. App. Okla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded After Certiorari Granted

No. 85-1735. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* OUTBOARD MARINE CORP. C. A. 7th Cir. [Certiorari granted, *ante*, p. 811.] Judgment vacated and case remanded for further consideration in light of the amendment of § 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U. S. C. § 9604(e), by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, § 104(m).

Miscellaneous Orders

No. — — ——. SCOTT *v.* THE NEWS HERALD ET AL. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A–420 (86–589). KRUPPS ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of enforcement of order of confinement, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending final disposition of the petition for writ of certiorari by this Court.

No. D–561. IN RE DISBARMENT OF STANTON. Disbarment entered. [For earlier order herein, see 478 U. S. 1018.]

No. D–571. IN RE DISBARMENT OF WILLIAMS. Disbarment entered. [For earlier order herein, see 478 U. S. 1038.]

No. D–591. IN RE DISBARMENT OF BURNS. It is ordered that Richard Gordon Burns, of Corte Madera, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–592. IN RE DISBARMENT OF GIOMETTI. It is ordered that Eugene M. Giometti, of Glendale, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–593. IN RE DISBARMENT OF CHRISTNER. It is ordered that Kenneth Dale Christner, of Pedro, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–594. IN RE DISBARMENT OF CERAME. It is ordered that John R. Cerame, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85–673. HARTIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL. C. A. 7th Cir. [Probable jurisdiction postponed, *ante*, p. 881.] Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus cu-*

riae denied. Motion of Alan Ernest to allow counsel to represent children unborn and born alive denied.

No. 85–1513. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* AGUILLARD ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 476 U. S. 1103.] Motion of appellants for leave to file reply brief out of time granted.

No. 85–1835. CALIFORNIA *v.* ROONEY. Ct. App. Cal., 2d App. Dist. [Certiorari granted, *ante*, p. 881.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 85–2156. SHAARE TEFILA CONGREGATION ET AL. *v.* COBB ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 812.] Motions of American-Arab Anti-Discrimination Committee and Anti-Defamation League of B'nai B'rith et al. for leave to file briefs as *amici curiae* granted.

No. 86–246. SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. *v.* SHUMAN. C. A. 9th Cir. [Certiorari granted, *ante*, p. 948.] Motion for appointment of counsel granted, and it is ordered that N. Patrick Flanagan III, Esquire, of Reno, Nev., be appointed to serve as counsel for respondent in this case.

No. 86–475. FRAZIER *v.* HEEBE, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 960.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 86–637. COMMUNICATIONS WORKERS OF AMERICA ET AL. *v.* BECK ET AL. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 86–5838. IN RE CLOUGH. Petition for writ of habeas corpus denied.

No. 86–620. IN RE ALBERT ET AL. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 86–509. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* GILLIARD ET AL.; and

No. 86–564. KIRK, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, ET AL. *v.* GILLIARD ET AL. Appeals from D. C. W. D. N. C. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 633 F. Supp. 1529.

Certiorari Granted

No. 86–234. MCNALLY *v.* UNITED STATES; and

No. 86–286. GRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted in No. 86–234 limited to Question 4 presented by the petition and to Question 1 in No. 86–286 as incorporated by reference in No. 86–234. Certiorari granted in No. 86–286 limited to Questions 1 and 3 presented by the petition. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 790 F. 2d 1290.

No. 86–393. UNITED STATES ET AL. *v.* STANLEY ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 786 F. 2d 1490.

No. 86–495. K MART CORP. *v.* CARTIER, INC., ET AL.;

No. 86–624. 47TH STREET PHOTO, INC. *v.* COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.; and

No. 86–625. UNITED STATES ET AL. *v.* COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 252 U. S. App. D. C. 342, 790 F. 2d 903.

No. 86–572. KENTUCKY *v.* STINCER. Sup. Ct. Ky. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 712 S. W. 2d 939.

No. 86–5324. GRIFFIN *v.* WISCONSIN. Sup. Ct. Wis. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 131 Wis. 2d 41, 388 N. W. 2d 535.

Certiorari Denied. (See also Nos. 86–610 and 86–618, *supra.*)

No. 85–1524. HUBBARD BROADCASTING, INC. *v.* SOUTHERN SATELLITE SYSTEMS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 777 F. 2d 393.

No. 85-7055. CARRION *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 116 App. Div. 2d 1043, 496 N. Y. S. 2d 885.

No. 86-295. SMITH *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 511 Pa. 36, 511 A. 2d 796.

No. 86-361. ANDERSON ET AL. *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; BRANDIS ET AL. *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; BURGARD *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; CONROY *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; DELUTRI *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; ELLIS ET AL. *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; LYDON *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; MURPHY *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; PIORKOWSKI *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; ROMASHKO *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; and TOEPFER *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1014 (1st case); 795 F. 2d 1012 (2d case); 795 F. 2d 1012 (3d case); 795 F. 2d 1012 (4th case); 795 F. 2d 1011 (5th case); 795 F. 2d 1012 (6th case); 795 F. 2d 1012 (7th case); 795 F. 2d 1014 (8th case); 795 F. 2d 1012 (9th case); 795 F. 2d 1014 (10th case); 795 F. 2d 1011 (11th case).

No. 86-375. WHITE MOUNTAIN APACHE TRIBE *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 921.

No. 86-405. KASHANI *v.* NELSON, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 818.

No. 86-407. DODSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 237.

No. 86–416. HARWOOD ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1174.

No. 86–417. GARDNER ET AL. *v.* EVANS, GOVERNOR OF IDAHO, ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 110 Idaho 925, 719 P. 2d 1185.

No. 86–450. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION 201, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied.

No. 86–481. CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND ET AL. *v.* WHITWORTH BROS. STORAGE CO.; and

No. 86–666. WHITWORTH BROS. STORAGE CO. *v.* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 794 F. 2d 221.

No. 86–499. TERRELL ET AL. *v.* ALEXANDER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 469.

No. 86–518. EVERGREEN TOWERS, INC. *v.* CITY OF EAST ORANGE ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86–536. GRAHAM ET AL. *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 480 N. E. 2d 981.

No. 86–550. BECKHAM *v.* SUN NEWS ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 289 S. C. 28, 344 S. E. 2d 603.

No. 86–604. TOWNLEY, WARDEN, ET AL. *v.* CLARK. C. A. 4th Cir. Certiorari denied. Reported below: 791 F. 2d 925.

No. 86–607. DIAMOND SHAMROCK CORP. *v.* HAMILTON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 791 F. 2d 1416.

No. 86–609. CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION NO. 238 *v.* CRST, INC. C. A. 8th Cir. Certiorari denied. Reported below: 795 F. 2d 1400.

No. 86–614. WELCH *v.* CARSON PRODUCTIONS GROUP, LTD. C. A. 2d Cir. Certiorari denied. Reported below: 791 F. 2d 13.

No. 86-615. BROWN *v.* BROWN. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86-619. ALLEN *v.* CHILTON CO., DIVISION OF A. B. C., INC. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1130.

No. 86-623. SCHAAFSMA *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 491 So. 2d 564.

No. 86-626. TRENT ET AL. *v.* CODMAN & SHURTLEFF, INC., ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 86-630. CUMMINGS, A MINOR, BY HER GUARDIAN AD LITEM, TECHMEIER, ET AL. *v.* BRIGGS & STRATTON RETIREMENT PLAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 383.

No. 86-635. HOGUE *v.* CLINTON, GOVERNOR OF ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 791 F. 2d 1318.

No. 86-638. CLARK OIL & REFINING CORP. *v.* GO-TANE SERVICE STATIONS, INC. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 798 F. 2d 481.

No. 86-639. DAIGLE *v.* GULF STATES UTILITY CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 794 F. 2d 974.

No. 86-645. HOLDEN *v.* OWENS-ILLINOIS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 745.

No. 86-657. MALACHOWSKI ET UX. *v.* CITY OF KEENE ET AL. C. A. 1st Cir. Certiorari denied.

No. 86-662. NATIVE VILLAGE OF NENANA *v.* ALASKA DEPARTMENT OF HEALTH AND SOCIAL SERVICES. Sup. Ct. Alaska. Certiorari denied. Reported below: 722 P. 2d 219.

No. 86-665. STONE, INDIVIDUALLY AND AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF STONE, ET AL. *v.* PARADISE HOLDINGS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 795 F. 2d 756.

No. 86-687. MERTZ *v.* MARSH, SECRETARY OF THE ARMY. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1578.

No. 86-699. ALLEN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 492 So. 2d 669.

No. 86-739. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 802 F. 2d 731.

No. 86-748. CHUNIE, AKA HERRERA, ET AL. *v.* RINGROSE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 638.

No. 86-752. DLUGOSZ *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 471.

No. 86-755. STEFAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 1093.

No. 86-5090. ADAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 917.

No. 86-5201. GRANGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 790 F. 2d 892.

No. 86-5370. VESTER *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 795 F. 2d 1007.

No. 86-5387. LAFRAMBOISE *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 86-5432. WILLIAMS *v.* ROGERS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 791 F. 2d 166.

No. 86-5456. ELY *v.* MORE THAN 20 FBI AGENTS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 792 F. 2d 142.

No. 86-5518. OWENS-EL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 795 F. 2d 82.

No. 86-5532. CAPOBIANCHI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1140.

No. 86-5572. NAJOHN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 1420.

No. 86-5652. SUN *v.* BUSH ET AL. Ct. App. Ga. Certiorari denied. Reported below: 179 Ga. App. 80, 345 S. E. 2d 85.

No. 86–5653. McBEE *v.* HARRISON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 458.

No. 86–5664. CASAS *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 181 Cal. App. 3d 889, 226 Cal. Rptr. 285.

No. 86–5667. JOYNER *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 1317.

No. 86–5674. JOHNS *v.* ESTELLE, SUPERINTENDENT, CALIFORNIA MEN'S COLONY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 801 F. 2d 399.

No. 86–5677. MAFFEI *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1135.

No. 86–5682. HALL *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 1418.

No. 86–5684. DRUMHELLER *v.* SAMBERG, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 1475.

No. 86–5691. CASTLE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 86–5693. McNEIL *v.* CUYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 443.

No. 86–5694. RICHARD *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 398 Mass. 392, 496 N. E. 2d 1366.

No. 86–5696. PANNACCI *v.* THORP CONSUMER DISCOUNT CO. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1140.

No. 86–5706. BENTLEY *v.* BENTLEY. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 1418.

No. 86–5710. ASHLEY *v.* ARMSTRONG, CONTROLLER OF THE COLORADO DEPARTMENT OF LABOR, ET AL. C. A. 10th Cir. Certiorari denied.

No. 86–5713. SHABAZZ *v.* BARNAUSKAS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 790 F. 2d 1536.

No. 86–5714. WISE ET UX. *v.* KAISER, TRUSTEE. C. A. 7th Cir. Certiorari denied. Reported below: 791 F. 2d 73.

No. 86–5715. TYNER *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 86–5716. PAYTON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 492 So. 2d 674.

No. 86–5717. MAY *v.* BUREAU OF MOTOR VEHICLES. Sup. Ct. Ohio. Certiorari denied.

No. 86–5719. MATTHEWS *v.* MCCLUNG ET AL. C. A. 11th Cir. Certiorari denied.

No. 86–5727. WARE *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 475.

No. 86–5734. HEYWARD *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 23 M. J. 49.

No. 86–5756. WILLIAMS *v.* L. C. P. CHEMICALS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 461.

No. 86–5764. NORWOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 798 F. 2d 1094.

No. 86–5766. HIGDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 1419.

No. 86–5772. NEELY *v.* UNITED STATES; and
No. 86–5773. RICHIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 722.

No. 86–5776. EINARSON *v.* FLAMM. C. A. 1st Cir. Certiorari denied. Reported below: 802 F. 2d 441.

No. 86–5778. HARRELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 86–5793. CARTER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 78.

No. 86–5802. MARCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 264.

No. 86–5810. MALADY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 802 F. 2d 463.

No. 86–5811. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 460.

No. 86–5824. BARNES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 1146.

No. 86–390. MULTIMEDIA, INC. *v.* HAWKINS, BY AND THROUGH HIS GUARDIAN AD LITEM, HAWKINS. Sup. Ct. S. C. Motions of North Carolina Press Association et al. and Conus Communications for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 288 S. C. 569, 344 S. E. 2d 145.

No. 86–396. ILLINOIS *v.* ANDERSON. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 113 Ill. 2d 1, 495 N. E. 2d 485.

No. 86–641. THOMPSON *v.* CASAS. Sup. Ct. Cal. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 42 Cal. 3d 131, 720 P. 2d 921.

No. 86–5024. DIAMEN *v.* MARTIN ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition.

No. 86–5314. MILTON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. JUSTICE BRENNAN would grant certiorari and set the case for oral argument. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant certiorari, vacate the judgment of the District Court of Appeal of Florida, First District, and remand the case for further consideration in light of *Smalis* v. *Pennsylvania*, 476 U. S. 140 (1986). Reported below: 488 So. 2d 878.

Rehearing Denied

No. 85–2168. FLEMING *v.* MOORE, *ante*, p. 890;

No. 86–113. AMERICAN BAPTIST CHURCHES IN THE U. S. A. ET AL. *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL., *ante*, p. 914; and

No. 86–5472. CREASEY *v.* MUNCY, WARDEN, ET AL., *ante*, p. 936. Petition for rehearing denied.

No. 86–5003. GAMBRELL *v.* ACKERMAN, JUDGE, *ante*, p. 855. Petition for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of this petition.

DECEMBER 9, 1986

Appeal Dismissed. (See No. 85–1022, *ante*, at 139.)

DECEMBER 12, 1986

Miscellaneous Order

No. A–436. ANDRADE V. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death and for certificate of probable cause, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

DECEMBER 15, 1986

Dismissal Under Rule 53

No. 86–764. MERCHANTS NATIONAL BANK OF FORT SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 797 F. 2d 676.

Affirmed on Appeal

No. 86–731. MINGO ET AL. *v.* JAMES ET AL. Affirmed on appeal from D. C. S. D. Miss.

Appeals Dismissed

No. 86–654. PEREZ ET AL. *v.* PUERTO RICO. Appeal from Sup. Ct. P. R. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 117 D. P. R. 380.

No. 86–5725. ABDULLAH *v.* RAINWATER ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–5758. PERKINS *v.* HARTIGAN, ATTORNEY GENERAL OF ILLINOIS, ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–670. KANTORSKI *v.* L. F. C. LEASING & FINANCIAL CORP. Appeal from App. Ct. Mass. dismissed for want of jurisdiction. Reported below: 22 Mass. App. 1103, 491 N. E. 2d 1088.

No. 86–695. HANSEN ET AL. *v.* UNITED STATES. Appeal from D. C. W. D. Wis. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 86–86. SHULTZ, SECRETARY OF STATE *v.* COOPER ET AL.; and

No. 86–284. COOPER ET AL. *v.* SHULTZ, SECRETARY OF STATE. C. A. D. C. Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546 (1986), and *Library of Congress* v. *Shaw*, 478 U. S. 310 (1986). JUSTICE SCALIA took no part in the consideration or decision of these cases. Reported below: 252 U. S. App. D. C. 18, 786 F. 2d 431.

Miscellaneous Orders

No. D–564. IN RE DISBARMENT OF HOLZER. Reginald Jack Holzer, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on September 11, 1986 [478 U. S. 1037], is hereby discharged.

No. D–569. IN RE DISBARMENT OF CHRISTAKIS. Lee J. Christakis, of Gary, Ind., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on September 11, 1986 [478 U. S. 1038], is hereby discharged.

No. D–573. IN RE DISBARMENT OF SHIELDS. Disbarment entered. [For earlier order herein, see 478 U. S. 1038.]

No. 85–1358. LUKHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF SOCIAL SERVICES *v.* REED ET AL. C. A. 4th Cir. [Certiorari granted, 477 U. S. 903.] Motion of the Solicitor General to permit Glen D. Nager, Esquire, to present oral argument *pro hac vice* granted.

No. 85–1963. TYLER PIPE INDUSTRIES, INC. *v.* WASHINGTON STATE DEPARTMENT OF REVENUE; and
No. 85–2006. NATIONAL CAN CORP. ET AL. *v.* WASHINGTON STATE DEPARTMENT OF REVENUE. Sup. Ct. Wash. [Probable jurisdiction noted, *ante*, p. 810.] Motion of appellants for divided argument granted. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 85–5348. BUCHANAN *v.* KENTUCKY. Sup. Ct. Ky. [Certiorari granted, 476 U. S. 1140.] Motion for appointment of counsel granted, and it is ordered that Kevin Michael McNally, Esquire, of Frankfort, Ky., be appointed to serve as counsel for petitioner in this case. Motion of petitioner for divided argument denied.

No. 86–6. RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMSON. C. A. 9th Cir. [Certiorari granted, *ante*, p. 812.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86–44. SHEARSON/AMERICAN EXPRESS INC. ET AL. *v.* MCMAHON ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 812.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86–87. UNITED STATES *v.* SALERNO ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 929.] Motion of American Bar Association for leave to file a brief as *amicus curiae* out of time granted.

No. 86–133. NOLLAN ET UX. *v.* CALIFORNIA COASTAL COMMISSION. Ct. App. Cal., 2d App. Dist. [Probable jurisdiction noted, *ante*, p. 913.] Motion of appellee to dismiss appeal denied.

No. 86-421. BOARD OF DIRECTORS OF ROTARY INTERNATIONAL ET AL. *v.* ROTARY CLUB OF DUARTE ET AL. Ct. App. Cal., 2d App. Dist. [Probable jurisdiction postponed, *ante*, p. 929.] Motion of California for leave to intervene granted. JUSTICE BLACKMUN and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 86-882. HODGSON ET AL. *v.* MINNESOTA ET AL. C. A. 8th Cir. Motion of petitioners to expedite consideration of petition for writ of certiorari before judgment denied.

No. 86-900. LABRANCHE *v.* UNITED STATES OLYMPIC COMMITTEE. C. A. 9th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari before judgment and to consolidate with No. 86-270, *San Francisco Arts & Athletics, Inc., et al.* v. *United States Olympic Committee et al.* [certiorari granted, *ante*, p. 913], denied.

No. 86-5479. WRENN *v.* OHIO DEPARTMENT OF MENTAL HEALTH, *ante*, p. 928. Motion of petitioner for reconsideration of order of Court denying leave to proceed *in forma pauperis* denied.

No. 86-5655. IN RE MANN;
No. 86-5739. IN RE CARPENTER; and
No. 86-5808. IN RE BURGESS. Petitions for writs of mandamus denied.

Certiorari Granted

No. 86-422. CARPENTER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion of Securities Industry Association, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 791 F. 2d 1024.

No. 86-656. REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. *v.* ABOUREZK ET AL. C. A. D. C. Cir. Certiorari granted. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 251 U. S. App. D. C. 355, 785 F. 2d 1043.

Certiorari Denied. (See also Nos. 86-654, 86-5725, and 86-5758, *supra*.)

No. 85-1946. MARSH *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 445.

No. 85–2028. GILL *v.* UNITED STATES; and
No. 85–7100. BRUNO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 922.

No. 85–2062. ACKER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 786 F. 2d 1126.

No. 85–7046. SMITH *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 85–7080. BAKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 781 F. 2d 85.

No. 85–7107. PAGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 785 F. 2d 378.

No. 85–7150. BENNY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1410.

No. 85–7184. GILES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85–7206. DIXON *v.* UNITED STATES; MALDONADO *v.* UNITED STATES; and GREEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 86–75. CIAMBRONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 787 F. 2d 799.

No. 86–100. SMITH *v.* UNITED STATES; and
No. 86–111. STONEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 789 F. 2d 196.

No. 86–121. PULLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1158.

No. 86–238. THOROUGHBRED RACING ASSOCIATIONS OF NORTH AMERICA, INC., ET AL. *v.* CAPRA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 787 F. 2d 463.

No. 86–409. METROPOLITAN TRANSPORTATION AUTHORITY ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 287.

No. 86–453. CARSON ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 790 F. 2d 562.

No. 86–491. GIANCOLA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 1549.

No. 86–529. TRINIDAD CORP. *v.* DISTRICT NO. 1, PACIFIC COAST DISTRICT, MARINE ENGINEERS' BENEFICIAL ASSN., AFL–CIO. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 116 App. Div. 2d 1048, 497 N. Y. S. 2d 806.

No. 86–642. UNITED TRANSPORTATION UNION *v.* TAYLOR ET AL.; and

No. 86–669. MISSOURI PACIFIC RAILROAD CO. ET AL. *v.* TAYLOR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 794 F. 2d 1082.

No. 86–643. KAYZAKIAN *v.* KRAJEWSKI ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 791 F. 2d 926.

No. 86–664. JAMES-MASSENGALE ET AL. *v.* MARTORI BROS. DISTRIBUTORS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 781 F. 2d 1349 and 791 F. 2d 799.

No. 86–667. POLYAK *v.* BUFORD EVANS & SONS. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 588.

No. 86–673. REVLON, INC. *v.* CARSON PRODUCTS CO. C. A. Fed. Cir. Certiorari denied. Reported below: 803 F. 2d 676.

No. 86–681. LAWSON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 86–682. PERKINS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 494 So. 2d 723.

No. 86–683. ZEMONICK ET AL. *v.* CONSOLIDATION COAL CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 1546.

No. 86–732. BRIEHLER *v.* TOWN OF JAMESTOWN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 802 F. 2d 439.

No. 86–756. BIRK ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 797 F. 2d 199.

No. 86–760. HESCORP *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 70.

No. 86–5039. McCONICO *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86–5131. CAMPBELL *v.* MILLER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 787 F. 2d 217.

No. 86–5135. MOUNTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 125.

No. 86–5158. HUTCHINS *v.* BROGAN. C. A. 8th Cir. Certiorari denied.

No. 86–5275. DAWSON *v.* McCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 86–5409. KATTOUAH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 460.

No. 86–5418. McCALEB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1416.

No. 86–5443. BONIFACE *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 1568.

No. 86–5540. FATT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 683.

No. 86–5602. KAHN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 787 F. 2d 586.

No. 86–5616. CONDOM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 797 F. 2d 980.

No. 86–5666. HARRISON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 86–5679. PLUNKETT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 719 P. 2d 834.

No. 86–5697. DEAN *v.* RAFFERTY, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1132.

No. 86–5708. JONES *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 469.

No. 86–5711. BRYANT *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 86–5712. BROWN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–5720. BOSQUE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–5726. STEPHENS *v.* LACK. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 460.

No. 86–5730. RUFFIN *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 2d 394.

No. 86–5731. LONG ET AL. *v.* MORAN, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied. Reported below: 802 F. 2d 440.

No. 86–5732. PALMER *v.* BERRY, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 795 F. 2d 88.

No. 86–5733. HOLLAND *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 473.

No. 86–5747. SIMPSON, AKA WOODS *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. Reported below: 795 F. 2d 216.

No. 86–5749. WOODFIN *v.* BOWEN. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1159.

No. 86–5751. BEGAY ET AL. *v.* SMIALEK, STATE MEDICAL INVESTIGATOR. Sup. Ct. N. M. Certiorari denied. Reported below: 104 N. M. 375, 721 P. 2d 1306.

No. 86–5755. SYKES *v.* VAN DE WATER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 789 F. 2d 922.

No. 86–5767. HARDIN *v.* REDMAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1414.

No. 86–5779. GHOLSTON *v.* LAMBERT ET AL. C. A. 11th Cir. Certiorari denied.

No. 86–5789. WIMAN *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 797 F. 2d 666.

No. 86–5790. STANKOWSKI *v.* MCDOWELL, SHERIFF, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 802 F. 2d 448.

No. 86–5792. BANKS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 793 F. 2d 1553.

No. 86–5807. CROCKETT *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 796 F. 2d 787.

No. 86–5812. WILLIAMS *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 11th Cir. Certiorari before judgment denied.

No. 86–5814. STONER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 799 F. 2d 1253.

No. 86–5817. STOUT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 1146.

No. 86–483. PIERCE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE and JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 254 U. S. App. D. C. 40, 794 F. 2d 749.

No. 86–697. ST. LOUIS HOME INSULATORS ET AL. *v.* BURROUGHS CORP. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 793 F. 2d 954.

No. 86–5373. SPIERINGS *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 718 P. 2d 156.

JUSTICE WHITE, dissenting.

In this case, the Supreme Court of the State of Alaska affirmed the petitioner's conviction, rejecting his argument that the trial judge improperly instructed the jury on a lesser included offense. *Dresnek* v. *State*, 718 P. 2d 156 (1986). Over the petitioner's objection, the trial judge gave a "transition instruction"; the jurors were instructed that they could not render a verdict on a lesser included offense until they unanimously acquitted the petitioner on the greater offense. The Alaska Supreme Court held that the instruction was proper. This decision conflicts with the approach

followed in the Courts of Appeals for the Second and Ninth Circuits. In *United States* v. *Tsanas*, 572 F. 2d 340 (CA2), cert. denied, 435 U. S. 995 (1978), the court held that if a defendant seasonably objects to this type of instruction, the trial judge should instruct the jury with an alternative formulation: jurors may consider the lesser included offense if they cannot reach agreement on the greater offense. 572 F. 2d, at 346. The Court of Appeals for the Ninth Circuit, in *United States* v. *Jackson*, 726 F. 2d 1466 (1984), followed the *Tsanas* approach. There, the court reasoned that "although either formulation may be employed if the defendant expresses no choice, it is error to reject the form timely requested by defendant." 726 F. 2d, at 1469. I would grant the petition of certiorari to resolve this conflict.

No. 86–5707. GARCIA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 492 So. 2d 360.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 86–5515. KINNELL *v.* MASCHNER, DIRECTOR, KANSAS STATE PENITENTIARY, ET AL., *ante*, p. 952. Petition for rehearing denied.

No. 85–2126. MALACHOWSKI ET UX. *v.* CITY OF KEENE ET AL., *ante*, p. 828;

No. 86–101. HARRIS ET AL. *v.* COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT, ET AL., *ante*, p. 851;

No. 86–194. MALACHOWSKI ET UX., ON BEHALF OF THE JUVENILE, AMY M. *v.* NEW HAMPSHIRE, *ante*, p. 854; and

No. 86–5177. WELLS *v.* CITY OF HOUSTON, TEXAS, ET AL., *ante*, p. 864. Petitions for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of these petitions.

DECEMBER 17, 1986

Miscellaneous Order

No. A–464. ANDRADE *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution

of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

DECEMBER 23, 1986

Dismissals Under Rule 53

No. 86-567. CURRY ET AL. *v.* BAKER ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 802 F. 2d 1302.

No. 86-569. GRADDICK, ATTORNEY GENERAL OF ALABAMA *v.* HENDERSON ET AL. Appeal from D. C. M. D. Ala. dismissed under this Court's Rule 53. Reported below: 641 F. Supp. 1192.

DECEMBER 30, 1986

Dismissal Under Rule 53

No. 86-613. GRIFFIN HOSPITAL *v.* COMMISSION ON HOSPITALS AND HEALTH CARE. Appeal from Sup. Ct. Conn. dismissed under this Court's Rule 53. Reported below: 200 Conn. 489, 512 A. 2d 199.

JANUARY 12, 1987

Appointment of Reporter of Decisions

It is ordered that Frank D. Wagner be appointed Reporter of Decisions of this Court to succeed Henry C. Lind, effective February 1, 1987, and he is charged with the duty of reporting the decisions of the present Term which have not been reported prior to February 1, 1987.

Appeals Dismissed

No. 85-1094. HOPFMANN ET AL. *v.* CONNOLLY ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 769 F. 2d 24.

No. 86–719. EDWARDS, ADMINISTRATRIX FOR THE ESTATE OF EDWARDS *v.* EDWARDS. Appeal from Sup. Ct. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 713 S. W. 2d 642.

No. 86–5782. HARRIS *v.* MENENDEZ. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–359. CASTRO GONZALEZ *v.* PUERTO RICO ET AL. Appeal from Super. Ct. Puerto Rico dismissed for want of substantial federal question.

No. 86–581. NEW YORK STATE RESTAURANT ASSN., INC., ET AL. *v.* CITY OF NEW YORK ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 119 App. Div. 2d 427, 500 N. Y. S. 2d 224.

No. 86–799. FISHER *v.* COPLEY PRESS, INC., ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question.

No. 86–5670. LOWERY *v.* NELSON ET AL. Appeal from Ct. App. Wash. dismissed for want of substantial federal question. Reported below: 43 Wash. App. 747, 719 P. 2d 594.

No. 86–686. HYDROPOOL & COGENERATION SERVICES, INC. *v.* CALIFORNIA PUBLIC UTILITIES COMMISSION ET AL. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

No. 86–712. BUTCHER ET UX. *v.* DEPARTMENT OF THE TREASURY, REVENUE DIVISION, FOR THE STATE OF MICHIGAN, ET AL. Appeal from Sup. Ct. Mich. dismissed for want of properly presented federal question. Reported below: 425 Mich. 262, 389 N. W. 2d 412.

No. 86–759. REARDON *v.* REARDON ET AL. Appeal from D. C. N. J. dismissed for want of jurisdiction.

Vacated and Remanded on Appeal

No. 86–434. EU, SECRETARY OF STATE OF CALIFORNIA, ET AL. *v.* SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMIT-

TEE ET AL. Appeal from C. A. 9th Cir. Judgment vacated and case remanded for further consideration in light of *Tashjian* v. *Republican Party of Connecticut*, *ante*, p. 208. JUSTICE STEVENS would affirm the judgment. THE CHIEF JUSTICE took no part in the consideration or decision of this case. Reported below: 792 F. 2d 802.

Certiorari Granted—Vacated and Remanded

No. 86-597. UNION GAS CO. *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499. Reported below: 792 F. 2d 372.

Miscellaneous Orders

No. ——. RUPP ET AL. *v.* UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 1439. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A-411 (86-6012). LEAVITT *v.* UNITED STATES. C. A. 11th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D-591. IN RE DISBARMENT OF BURNS. Richard Gordon Burns, of Corte Madera, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on December 8, 1986 [*ante*, p. 1003], is hereby discharged. THE CHIEF JUSTICE and JUSTICE O'CONNOR took no part in the consideration or decision of this order.

No. D-595. IN RE DISBARMENT OF HARTMAN. It is ordered that Ronald L. Hartman of Encino, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-596. IN RE DISBARMENT OF KRAMER. It is ordered that Stuart R. Kramer, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–597. IN RE DISBARMENT OF FABRÉ. It is ordered that Edwin George Fabré, of Detroit, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–598. IN RE DISBARMENT OF GORIN. It is ordered that Martin Manuel Gorin, of Kansas City, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–599. IN RE DISBARMENT OF HENRY. It is ordered that James Vance Henry, of Fresno, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–600. IN RE DISBARMENT OF TUCKER. It is ordered that Robert L. Tucker, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–601. IN RE DISBARMENT OF INTINI. It is ordered that Anthony Intini III, of Oak Brook, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85–1708. CALIFORNIA ET AL. *v.* CABAZON BAND OF MISSION INDIANS ET AL. C. A. 9th Cir. [Probable jurisdiction postponed, 476 U. S. 1168.] Motion of appellees for leave to file a supplemental brief after argument granted. Motion of appellants for leave to file a supplemental brief after argument granted.

No. 85–1722. O'LONE, ADMINISTRATOR, LEESBURG PRISON COMPLEX, ET AL. *v.* ESTATE OF SHABAZZ ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 881.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86–87. UNITED STATES *v.* SALERNO ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 929.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as

amici curiae out of time denied. Motion of Howard Perry for leave to file a brief as *amicus curiae* granted. Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 86–108. HILTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. *v.* BRAUNSKILL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 881.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 86–231. PENSION BENEFIT GUARANTY CORPORATION *v.* YAHN & MCDONNELL, INC., ET AL.; and

No. 86–253. UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN ET AL. *v.* YAHN & MCDONNELL, INC., ET AL. C. A. 3d Cir. [Probable jurisdiction noted, *ante*, p. 982.] Motion of appellants to dispense with printing the joint appendix granted. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 86–234. MCNALLY *v.* UNITED STATES; and

No. 86–286. GRAY *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, *ante*, p. 1005.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86–260. SOUTH DAKOTA *v.* DOLE, SECRETARY OF TRANSPORTATION. C. A. 8th Cir. [Certiorari granted, *ante*, p. 982.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 86–322. CRAWFORD FITTING CO. ET AL. *v.* J. T. GIBBONS, INC.; and

No. 86–328. CHAMPION INTERNATIONAL CORP. *v.* INTERNATIONAL WOODWORKERS OF AMERICA, AFL–CIO, CLC, ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 983.] Motions of petitioners to dispense with printing the joint appendix granted.

No. 86–337. BURLINGTON NORTHERN RAILROAD CO. *v.* OKLAHOMA TAX COMMISSION ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 913.] Motions of Association of American Railroads and American Bus Association for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86–511. COMMISSIONER OF INTERNAL REVENUE *v.* FINK ET UX. C. A. 6th Cir. [Certiorari granted, *ante*, p. 960.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86–572. KENTUCKY *v.* STINCER. Sup. Ct. Ky. [Certiorari granted, *ante*, p. 1005.] Motion for appointment of counsel granted, and it is ordered that Mark A. Posnansky, Esquire, of Frankfort, Ky., be appointed to serve as counsel for respondent in this case.

No. 86–953. ABELL *v.* UNITED STATES. Ct. Mil. App. Motion of petitioner to expedite consideration of petition for writ of certiorari and to consolidate with No. 85–1581, *Solorio* v. *United States* [certiorari granted, 476 U. S. 1181], denied.

No. 86–5765. WRENN *v.* MCFADDEN ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 2, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86–5905. IN RE TAYLOR. Petition for writ of habeas corpus denied.

No. 86–907. IN RE ZUGER;
No. 86–5738. IN RE CALPIN;
No. 86–5754. IN RE MCELROY;
No. 86–5785. IN RE MCQUEEN;
No. 86–5799. IN RE JOHL;
No. 86–5831. IN RE BLUITT; and
No. 86–5850. IN RE FLEMING. Petitions for writs of mandamus denied.

No. 86–804. IN RE ROWAN COS., INC. Petition for writ of mandamus and/or other relief denied.

Certiorari Granted

No. 86–489. LANGLEY ET UX. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 5th Cir. Certiorari granted. Reported below: 792 F. 2d 541.

No. 86–594. NATIONAL LABOR RELATIONS BOARD ET AL. *v.* UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 23, AFL–CIO. C. A. 3d Cir. Certiorari granted. Reported below: 788 F. 2d 178.

No. 86–651. UNITED PAPERWORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* MISCO, INC. C. A. 5th Cir. Certiorari granted. Reported below: 768 F. 2d 739.

No. 86–772. CITY OF ST. LOUIS *v.* PRAPROTNIK. C. A. 8th Cir. Certiorari granted. Reported below: 798 F. 2d 1168.

No. 86–327. MULLINS COAL CO., INC. OF VIRGINIA, ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. Motion of National Coal Association for leave to file a brief as *amicus curiae* granted. Motion of respondent Luke R. Ray for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 785 F. 2d 424.

No. 86–473. GWALTNEY OF SMITHFIELD, LTD. *v.* CHESAPEAKE BAY FOUNDATION, INC., ET AL. C. A. 4th Cir. Motion of Connecticut Business & Industry Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 791 F. 2d 304.

No. 86–492. BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE *v.* UNITED TECHNOLOGIES CORP. C. A. 4th Cir. Certiorari granted. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 792 F. 2d 413.

No. 86–595. UNITED STATES *v.* FAUSTO. C. A. Fed. Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of respondent for leave to file a cross-petition for writ of certiorari out of time denied. Certiorari granted. Reported below: 783 F. 2d 1020 and 791 F. 2d 1554.

Certiorari Denied. (See also Nos. 85–1094, 86–719, and 86–5782, *supra.*)

No. 85–1931. PATWARDHAN *v.* SAN ANTONIO COMMUNITY HOSPITAL ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85–7156. BROWN *v.* GUILLORY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 790 F. 2d 891.

No. 85-7163. LOCKHART *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 1275.

No. 86-382. SUTTON ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 795 F. 2d 1040.

No. 86-391. ASHER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 86-428. CUDD PRESSURE CONTROL, INC., ET AL. *v.* KINDLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 792 F. 2d 507.

No. 86-482. PATCHOGUE NURSING CENTER *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 797 F. 2d 1137.

No. 86-493. TEXAS STATE COMMISSION FOR THE BLIND ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 796 F. 2d 400.

No. 86-505. LUBBOCK INDEPENDENT SCHOOL DISTRICT *v.* TEXAS EDUCATION AGENCY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 790 F. 2d 1262.

No. 86-512. HANKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 792 F. 2d 140.

No. 86-523. MOSHER STEEL CO., DIVISION OF TRINITY INDUSTRIES, ET AL. *v.* BROCK, SECRETARY OF LABOR. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 1535.

No. 86-525. PAN AMERICAN WORLD AIRWAYS, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 796 F. 2d 314.

No. 86-534. CBS INC. *v.* MOLECULON RESEARCH CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 793 F. 2d 1261.

No. 86-537. PENA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 281.

No. 86-541. WALLACE ET AL. *v.* ALLEGHENY-LUDLUM INDUSTRIES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 794 F. 2d 686.

No. 86–556. MOORE ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 86–561. GRODE, INSURANCE COMMISSIONER OF PENNSYLVANIA *v.* UNITED SERVICES AUTOMOBILE ASSN. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 792 F. 2d 356.

No. 86–592. SYUFY ENTERPRISES *v.* AMERICAN MULTI-CINEMA, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 793 F. 2d 990.

No. 86–606. LOCKE *v.* MESA PETROLEUM CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 787 F. 2d 1484.

No. 86–621. SPECTOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 793 F. 2d 932.

No. 86–640. HARRIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROLLE *v.* CITY OF MIAMI. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 490 So. 2d 69.

No. 86–647. CUSENZA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 789 F. 2d 919.

No. 86–663. LORD ELECTRIC CO., INC., ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 797 F. 2d 1377.

No. 86–675. JASLOW DENTAL LABORATORY, INC., ET AL. *v.* WHELAN ASSOCIATES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 797 F. 2d 1222.

No. 86–679. BOOTH NEWSPAPERS, INC. *v.* DEWITT, JUDGE, MIDLAND COUNTY CIRCUIT COURT, ET AL. Ct. App. Mich. Certiorari denied. Reported below: 145 Mich. App. 396, 377 N. W. 2d 868.

No. 86–685. CRISWELL *v.* BALTIMORE & OHIO RAILROAD CO., INC. C. A. 4th Cir. Certiorari denied.

No. 86–690. GASAWAY, DBA SUBURBAN SEALING CO. *v.* LABORERS' PENSION FUND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 1296.

No. 86–693. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 793 F. 2d 85.

No. 86–694. KOLENTUS ET AL. *v.* AVCO CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 798 F. 2d 949.

No. 86–702. JOHNSON ET UX. *v.* FEDERAL LAND BANK OF LOUISVILLE ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 24 Ohio St. 3d 69, 493 N. E. 2d 946.

No. 86–707. JENSEN *v.* COUNTY OF LANCASTER ET AL. Cir. Ct. Lancaster County, Va. Certiorari denied.

No. 86–710. SLADE *v.* UNITED STATES OF MEXICO. C. A. D. C. Cir. Certiorari denied. Reported below: 252 U. S. App. D. C. 341, 790 F. 2d 163.

No. 86–713. STORRS *v.* MUNICIPALITY OF ANCHORAGE. Sup. Ct. Alaska. Certiorari denied. Reported below: 721 P. 2d 1146.

No. 86–716. RANDOLPH COUNTY *v.* ALABAMA POWER CO. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 1067.

No. 86–717. NAMACO INDUSTRIES, INC. *v.* ROBART WOOD & WIRE PRODUCTS CORP. C. A. 4th Cir. Certiorari denied. Reported below: 797 F. 2d 176.

No. 86–718. ALEXANDER *v.* CITY OF MENLO PARK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 787 F. 2d 1371.

No. 86–720. LOOART PRESS, INC. *v.* CALIFORNIA STATE BOARD OF EQUALIZATION. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 86–723. COHEN *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 86–725. DOOLEY ET AL. *v.* AMERICAN AIRLINES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 1447.

No. 86–726. BAKER *v.* LOS ANGELES HERALD EXAMINER ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 42 Cal. 3d 254, 721 P. 2d 87.

No. 86–727. DERVISHIAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 86–730. CANNON *v.* LOYOLA UNIVERSITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 784 F. 2d 777.

No. 86–733. BADER ET AL. *v.* ITEL CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 672.

No. 86–734. ROTHERY STORAGE & VAN CO., INC., ET AL. *v.* ATLAS VAN LINES, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 253 U. S. App. D. C. 142, 792 F. 2d 210.

No. 86–742. HARRELL ET AL. *v.* REEVES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 1481.

No. 86–743. ZIECHMANN ET AL. *v.* ADOMAITIS ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 86–750. SIMPSON PAPER CO. *v.* CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 86–754. ROYAL CENTER, INC. *v.* LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 796 F. 2d 1159.

No. 86–766. AIRLINES TRANSPORTATION CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1136.

No. 86–767. PEREZ *v.* LAREDO JUNIOR COLLEGE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 795 F. 2d 83.

No. 86–768. KANSAS CITY SOUTHERN RAILWAY CO. *v.* MISSOURI PACIFIC RAILROAD CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 798 F. 2d 1410.

No. 86–769. HOUGH *v.* KISS ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86–770. HARRIS *v.* BLAKE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 798 F. 2d 419.

No. 86–771. INTERMEDICS INC. *v.* MEDTRONIC, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 799 F. 2d 734.

No. 86–773. STORA KOPPARBERGS BERGSLAGS AB ET AL. *v.* CRUCIBLE, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 793 F. 2d 1565.

No. 86–774. CAMAROTA *v.* BERGER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1132.

No. 86–777. MINCHEW *v.* FIERER. C. A. 4th Cir. Certiorari denied. Reported below: 795 F. 2d 81.

No. 86–778. MCCOLLUM ET AL. *v.* TISCH, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 794 F. 2d 602.

No. 86–779. DELORETO ET AL. *v.* CITY OF SANTA BARBARA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–780. LA FOLLETTE, ATTORNEY GENERAL OF WISCONSIN *v.* BURLINGTON NORTHERN RAILROAD CO. ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 131 Wis. 2d 564, 388 N. W. 2d 916.

No. 86–782. STICKLEN ET AL. *v.* CITY OF MIDDLETOWN, OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 25 Ohio St. 3d 71, 495 N. E. 2d 380.

No. 86–783. WECHT *v.* ALLEGHENY COUNTY. Pa. Commw. Ct. Certiorari denied. Reported below: 88 Pa. Commw. 128, 488 A. 2d 671.

No. 86–785. CORRIGAN ET AL. *v.* SOMMERS DRUG STORES CO. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 1456.

No. 86–786. MUELLER ET AL. *v.* UEHLEIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 794 F. 2d 300.

No. 86–789. AMERICAN MULTI-CINEMA, INC. *v.* SYUFY ENTERPRISES. C. A. 9th Cir. Certiorari denied. Reported below: 793 F. 2d 990.

No. 86–790. SCHWARZ *v.* CITY OF WARWICK ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 802 F. 2d 440.

No. 86–791. GREY *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 86-795. WESTMAC, INC. *v.* SMITH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 797 F. 2d 313.

No. 86-796. JACKSON *v.* NATIONAL BROADCASTING CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 790 F. 2d 87.

No. 86-798. BOYD *v.* MCNEILAB, INC. C. A. 5th Cir. Certiorari denied. Reported below: 798 F. 2d 1410.

No. 86-801. PARRO ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1018.

No. 86-812. JOHNSON *v.* PERLMUTTER. App. Ct. Conn. Certiorari denied. Reported below: 6 Conn. App. 292, 505 A. 2d 13.

No. 86-813. HOMEBOUND HEALTH CARE AGENCY *v.* TENNESSEE VALLEY HOME HEALTH AGENCY ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 494 So. 2d 640.

No. 86-816. HICKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 446.

No. 86-817. CARDEN ET AL. *v.* ARKOMA ASSOCIATES. C. A. 5th Cir. Certiorari denied.

No. 86-821. LEE *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 789 F. 2d 921.

No. 86-824. MORRIS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 23 M. J. 161.

No. 86-829. DIAMOND SHAMROCK CORP. *v.* ZINKE & TRUMBO ET AL. C. A. 10th Cir. Certiorari denied.

No. 86-837. BIERMANN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 800 F. 2d 266.

No. 86-846. GOODMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1140.

No. 86-850. BENSON ET UX. *v.* RAUSEO ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 67 Md. App. 758.

No. 86–851. BRIGGS *v.* HAGEN, ADMINISTRATRIX OF THE ESTATE OF HAGEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 792 F. 2d 1119.

No. 86–853. GRIFFIN, EXECUTRIX OF THE ESTATE OF COBB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 457.

No. 86–868. STAHL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1438.

No. 86–901. COCHRAN *v.* RIVERS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 794 F. 2d 685.

No. 86–911. KRALL *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF SOUTH DAKOTA. C. A. 8th Cir. Certiorari denied.

No. 86–928. NEAL *v.* WHITE, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 802 F. 2d 1397.

No. 86–936. VAMOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 797 F. 2d 1146.

No. 86–944. SULLIVAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 803 F. 2d 87.

No. 86–5047. LAWSON *v.* CREDITHRIFT OF AMERICA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 933.

No. 86–5100. WOOD *v.* MCMACKIN, SUPERINTENDENT, HOCKING CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 790 F. 2d 548.

No. 86–5147. MORTON *v.* FOLTZ, ADMINISTRATOR, MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1042.

No. 86–5193. SPENCER *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 791 F. 2d 929.

No. 86–5230. PATTERSON *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 791 F. 2d 107.

No. 86–5377. WOODS *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 787 F. 2d 310.

No. 86-5378. KACHBALIAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1141.

No. 86-5388. TYSON *v.* MCKELLAR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 1560.

No. 86-5419. STOCKARD *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 792 F. 2d 1124.

No. 86-5465. SHEGRUD *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 131 Wis. 2d 133, 389 N. W. 2d 7.

No. 86-5508. MAGHE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 86-5524. MAYER *v.* ANGELICA. C. A. 7th Cir. Certiorari denied. Reported below: 790 F. 2d 1315.

No. 86-5549. WILSHIRE *v.* RHODE ISLAND ET AL. Sup. Ct. R. I. Certiorari denied. Reported below: 509 A. 2d 444.

No. 86-5557. CHEESEMAN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 791 F. 2d 138.

No. 86-5566. RIZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 795 F. 2d 1008.

No. 86-5570. HUERTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1492.

No. 86-5601. HARROLD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 796 F. 2d 1275.

No. 86-5611. EURY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 792 F. 2d 441.

No. 86-5624. PITTS *v.* DISPENZA, DEPUTY EXECUTIVE SECRETARY, AIR FORCE BOARD FOR THE CORRECTION OF MILITARY RECORDS. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 471.

No. 86-5632. SCINTO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 795 F. 2d 87.

No. 86-5648. MCCOWN *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 796 F. 2d 151.

No. 86-5649. MICHAELS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 796 F. 2d 1112.

No. 86-5658. DOMINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 1361.

No. 86-5673. HASSAIN *v.* JOHNSON. C. A. 9th Cir. Certiorari denied. Reported below: 790 F. 2d 1420.

No. 86-5681. KOVACS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 472.

No. 86-5688. ELLISON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 798 F. 2d 1102.

No. 86-5695. WEBB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 796 F. 2d 60.

No. 86-5721. BUNCH *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 472.

No. 86-5724. TAUVAR *v.* BAR HARBOR CONGREGATION OF JEHOVAH'S WITNESSES, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 787 F. 2d 579.

No. 86-5735. HUBBARD *v.* ONION. C. A. 5th Cir. Certiorari denied.

No. 86-5743. TOWNES *v.* BRASHER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 795 F. 2d 1008.

No. 86-5748. SHEWCHUN *v.* NEESE ET AL. C. A. 11th Cir. Certiorari denied.

No. 86-5750. LUCIEN *v.* CHRANS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 86-5753. HARVEY *v.* TORRES ET AL. C. A. 5th Cir. Certiorari denied.

No. 86-5757. ROYAL *v.* EXXON U. S. A. CHEMICAL DEPARTMENT. C. A. 5th Cir. Certiorari denied.

No. 86-5759. RIVERA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 86–5760. JORDAN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 39 Wash. App. 530, 694 P. 2d 47.

No. 86–5763. ROBINSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 392.

No. 86–5770. SIMMONS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 801 F. 2d 402.

No. 86–5771. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 55.

No. 86–5774. STAPLES *v.* YOUNG. Ct. App. Wis. Certiorari denied. Reported below: 132 Wis. 2d 481, 392 N. W. 2d 849.

No. 86–5777. LOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 800 F. 2d 266.

No. 86–5780. ABBOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 800 F. 2d 1143.

No. 86–5781. BEASLEY *v.* McCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 798 F. 2d 116.

No. 86–5783. HARRIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 494 So. 2d 1151.

No. 86–5788. GREEN *v.* SUMTER POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 473.

No. 86–5791. RAMAZETTI *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 459.

No. 86–5794. HUMPHREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 86–5795. CARONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 922.

No. 86–5796. CARR *v.* CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 1180.

No. 86-5797. HARDY *v.* MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD ET AL. Sup. Ct. Minn. Certiorari denied.

No. 86-5798. BAZILE *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 795 F. 2d 1008.

No. 86-5803. DANIELS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 534 So. 2d 656.

No. 86-5804. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 722.

No. 86-5805. MCMANNIS *v.* HEDRICK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 473.

No. 86-5806. ANDREWS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 132 Wis. 2d 479, 392 N. W. 2d 848.

No. 86-5813. CRENSHAW *v.* CITY OF TOLEDO ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 86-5816. JAMES *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 180 Ga. App. 7, 348 S. E. 2d 502.

No. 86-5818. MINOR *v.* BUREAU OF SOCIAL SERVICES OF HENNEPIN COUNTY, MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 391 N. W. 2d 791.

No. 86-5820. DUNDORE ET UX. *v.* O'DONNELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 916.

No. 86-5821. WARD *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 86-5822. RUSSELL *v.* NORTHWESTERN MUTUAL INSURANCE CO. Ct. App. Wis. Certiorari denied.

No. 86-5823. DAVIS *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 86-5826. GRAY *v.* HOLLAND, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 2d 394.

No. 86-5830. GENTSCH *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86–5832. AVITIA *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 7th Cir. Certiorari denied.

No. 86–5834. BLYTHER *v.* WASHINGTON GAS LIGHT CO. Ct. App. D. C. Certiorari denied.

No. 86–5835. COLLIER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 86–5836. COLLIER *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 803 F. 2d 1183.

No. 86–5839. ROBINSON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 802 F. 2d 464.

No. 86–5840. STEWART *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 495 So. 2d 494.

No. 86–5843. HASAN *v.* GREYHOUND LEASING & FINANCIAL CORP. C. A. 9th Cir. Certiorari denied.

No. 86–5845. JACKSON *v.* THIERET, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 86–5848. HARRIS *v.* JUDICIAL QUALIFICATIONS COMMISSION. Sup. Ct. Fla. Certiorari denied. Reported below: 496 So. 2d 142.

No. 86–5849. BRITT *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 795 F. 2d 81.

No. 86–5851. CANE *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1413.

No. 86–5852. GILMORE *v.* MARKS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 799 F. 2d 51.

No. 86–5853. FLETCHER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 86–5854. LINDO *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1122.

No. 86–5856. REED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 1418.

No. 86–5858. KENAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 722.

No. 86–5859. CRUZ-RIVERA *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 795 F. 2d 77.

No. 86–5860. OBADELE *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 253 U. S. App. D. C. 39, 791 F. 2d 210.

No. 86–5863. DUBOSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 475.

No. 86–5869. FOUNTAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 802 F. 2d 1398.

No. 86–5876. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 797 F. 2d 979.

No. 86–5882. HARRISON *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 790 F. 2d 83.

No. 86–5886. TELEPO *v.* EDWARDS ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 105 N. J. 562, 523 A. 2d 195.

No. 86–5893. POLONIA *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 795 F. 2d 76.

No. 86–5896. MORRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 802 F. 2d 447.

No. 86–5898. OLUSHOGA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 722.

No. 86–5908. IBE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 799 F. 2d 751.

No. 86–5909. CRACHY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 800 F. 2d 83.

No. 86-5914. WILLIAMS *v.* MARLBORO STATE HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 923.

No. 86-5925. MILLSAP *v.* GUDDUCCI. C. A. 2d Cir. Certiorari denied.

No. 86-5927. BOWMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 798 F. 2d 333.

No. 86-5932. KUZMA *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 798 F. 2d 29.

No. 86-5936. GITTMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 802 F. 2d 449.

No. 86-5937. BIBB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 1475.

No. 86-5942. TAFT-TSARELKA *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 802 F. 2d 441.

No. 86-354. HUBER ET AL. *v.* UNITED STATES MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. JUSTICE WHITE would deny certiorari. Reported below: 793 F. 2d 284.

No. 86-522. COLORADO INTERSTATE GAS CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 10th Cir. Motion of Tennessee Gas Pipeline Co. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 791 F. 2d 803.

No. 86-563. CIPOLLONE, EXECUTOR OF THE ESTATE OF CIPOLLONE *v.* LIGGETT GROUP, INC., ET AL. C. A. 3d Cir. Motion of American Heart Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this motion and this petition. Reported below: 789 F. 2d 181.

No. 86-636. MARTIN COUNTY, FLORIDA *v.* MAKEMSON ET AL.; and OKEECHOBEE COUNTY, FLORIDA *v.* DENNIS ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 491 So. 2d 1109 (first case); 491 So. 2d 1115 (second case).

JUSTICE WHITE, dissenting.

Petitioners are two political subdivisions in the State of Florida that have filed a single petition for certiorari, under this Court's Rule 19.4, seeking review of two separate judgments of the Supreme Court of Florida. Both cases present the same federal constitutional question; I set forth the facts in *Martin County* v. *Makemson* only.

Respondent Robert Makemson was appointed under Florida law to represent a defendant charged with first-degree murder, kidnaping, and armed robbery. Respondent's representation of the defendant spanned a 9-month period, and upon completion of the task respondent petitioned the trial court, pursuant to Fla. Stat. § 925.036 (1985),* for attorney's fees in the amount of $9,500. Section 925.036(2)(d) establishes a limit of $3,500 on compensation to appointed attorneys who represent capital defendants at trial. Notwithstanding this provision, the state trial court awarded respondent the $9,500 he requested, declaring that "'in setting rigid maximum fees without regard to the circumstances in each case[, § 925.036] is arbitrary and capricious and violates the due process clause of the United States and Florida Constitutions.'" 491 So. 2d 1109, 1111 (1986). The Fourth District Court of Appeals quashed the trial court's order declaring § 925.036 unconstitutional and certified several pertinent questions to the Florida Supreme Court. 464 So. 2d 1281 (1985). The Supreme Court held, *inter alia*, that the statute, while facially valid, was unconstitutional as applied to this case. The court reasoned:

> "[W]e find that the statutory maximum fees, as inflexibly imposed in cases involving unusual or extraordinary circum-

*Florida Stat. § 925.036 (1985) provides, in relevant part:

"(1) An attorney appointed pursuant to s. 925.035 or s. 27.53 shall, at the conclusion of the representation, be compensated at an hourly rate fixed by the chief judge or senior judge of the circuit in an amount not to exceed the prevailing hourly rate for similar representation rendered in the circuit; however, such compensation shall not exceed the maximum fee limits established by this section. . . .

"(2) The compensation for representation shall not exceed the following:

"(a) For misdemeanors and juveniles represented at the trial level: $1,000.

"(b) For noncapital, nonlife felonies represented at the trial level: $2,500.

"(c) For life felonies represented at the trial level: $3,000.

"(d) For capital cases represented at the trial level: $3,500.

"(e) For representation on appeal: $2,000."

> stances, interfere with the defendant's sixth amendment right 'to have the assistance of counsel for his defense.' The statute, as applied to many of today's cases, provides for only token compensation. The availability of effective counsel is therefore called into question in those cases when it is needed most.
>
> . . . . .
>
> "[Section 925.036] interferes with the sixth amendment right to counsel. . . . [W]e must not lose sight of the fact that it is the defendant's right to effective representation rather than the attorney's right to fair compensation which is our focus." 491 So. 2d, at 1112.

This Court has never held that the Sixth Amendment right to counsel, made applicable to the States by the Fourteenth Amendment, requires the States and their political subdivisions to pay appointed counsel reasonable compensation for their services. Indeed, under our existing cases, I discern nothing in the Sixth Amendment that would prohibit a State from requiring its lawyers to represent indigent criminal defendants without *any* compensation for their services at all. By my view, Florida had no Sixth Amendment duty to enact § 925.036; it follows *a fortiori* that the Sixth Amendment does not require the State or its political subdivisions to pay *more* than the limits established in that statute. This view is consistent with our decision in *Powell* v. *Alabama*, 287 U. S. 45 (1932). There, the Court held that a state trial court had a duty to assign counsel in a capital case where the defendant was unable to employ an attorney and was incapable of representing himself. The Court asserted that "[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment." *Id.*, at 73.

Even were I not of this view, I would still vote to grant the petition for certiorari because the decisions in these cases conflict with the decisions of other courts. In *Williamson* v. *Vardeman*, 674 F. 2d 1211, 1214 (1982), for example, the Eighth Circuit held that the courts of Missouri could constitutionally compel private attorneys to represent indigent defendants without compensation for their services. And, in *New Jersey* v. *Rush*, 46 N. J. 399, 217 A. 2d 441 (1966), the Supreme Court of New Jersey expressly rejected the argument that the Sixth Amendment mandates payment of fees to appointed counsel. The court assumed—perhaps

gratuitously—that an attorney had standing to assert the Sixth Amendment right of his client, and stated that it knew "of no data to support a claim that an assigned attorney fails or shirks in the least the full measure of an attorney's obligation to a client. . . . A lawyer needs no motivation beyond his sense of duty and his pride." *Id.*, at 405–406, 217 A. 2d, at 444.

This petition presents an important issue of constitutional law that the Court should address. I respectfully dissent from the denial of certiorari.

No. 86–704. MINNESOTA *v.* BERNDT. Sup. Ct. Minn. Motion of Minnesota County Attorneys Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 392 N. W. 2d 876.

No. 86–747. HEINTZ, COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE *v.* HILLBURN ET AL. C. A. 2d Cir. Motion of Connecticut Association of Health Care Facilities, Inc., for leave to file a brief as *amicus curiae* granted. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 795 F. 2d 252.

No. 86–797. MICHIGAN *v.* BOOKER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 801 F. 2d 871.

No. 86–5420. BELL *v.* TEXAS. Ct. Crim. App. Tex.;

No. 86–5614. CARTER *v.* TENNESSEE. Sup. Ct. Tenn.; and

No. 86–5844. BOYD *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: No. 86–5420, 707 S. W. 2d 52; No. 86–5614, 714 S. W. 2d 241; No. 86–5844, 494 N. E. 2d 284.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 86–5787 (A–272). GOODRICH *v.* BUNNELL, SUPERINTENDENT, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th

Cir. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied. Certiorari denied.

No. 86–5809. POINDEXTER *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 252 U. S. App. D. C. 240, 789 F. 2d 72.

Rehearing Denied

No. 85–7111. PEEK *v.* KEMP, WARDEN, *ante*, p. 939;

No. 86–139. CITY OF NEWPORT, KENTUCKY, ET AL. *v.* IACOBUCCI, DBA TALK OF THE TOWN, ET AL., *ante*, p. 92;

No. 86–277. WALKER *v.* ILLINOIS, *ante*, p. 995;

No. 86–404. WHALEY *v.* UNITED STATES, *ante*, p. 962;

No. 86–424. STICH *v.* STICH, *ante*, p. 946;

No. 86–474. CLISSURAS *v.* CITY OF NEW YORK ET AL., *ante*, p. 933;

No. 86–5320. MILLER *v.* CALIFORNIA, *ante*, p. 989;

No. 86–5410. SINGLETON *v.* FREY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, *ante*, p. 934;

No. 86–5414. IN RE MAGOON, *ante*, p. 928;

No. 86–5448. IN RE PARRISH, *ante*, p. 928;

No. 86–5456. ELY *v.* MORE THAN 20 FBI AGENTS ET AL., *ante*, p. 1009;

No. 86–5493. ZAKY *v.* UNITED STATES VETERANS ADMINISTRATION ET AL., *ante*, p. 937;

No. 86–5529. CHAMBERS *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL., *ante*, p. 952;

No. 86–5547. IN RE JOHL, *ante*, p. 947; and

No. 86–5559. BUTLER *v.* TEXAS, *ante*, p. 946. Petitions for rehearing denied.

No. 85–1887. FENNELL *v.* WARNER LAMBERT CO., *ante*, p. 817;

No. 85–6052. AUGUSTYNIAK *v.* CITY OF NEW YORK ET AL., 475 U. S. 1027;

No. 85–7012. ROBERTS *v.* MACKEY ET AL., *ante*, p. 836;

No. 85–7146. YOUNGS-SETTLE *v.* ANDERSON, *ante*, p. 843;

No. 86–5136. MISSIRLIAN *v.* HUNTINGTON MEMORIAL HOSPITAL, *ante*, p. 862; and

No. 86–5166. LIRA *v.* UNITED STATES, *ante*, p. 863. Petitions for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of these petitions.

No. 83–5010. GELB *v.* UNITED STATES, 464 U. S. 853;
No. 85–7027. IN RE WEYGANDT, *ante*, p. 809;
No. 85–7033. VIOLA *v.* UNITED STATES, *ante*, p. 837;
No. 86–5138. VIOLA *v.* KUBITZA ET AL., *ante*, p. 862; and
No. 86–5224. VIOLA *v.* ARIZONA, *ante*, p. 804. Motions for leave to file petitions for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of these motions.

No. 86–5330. OTWORTH *v.* SOUTHERN PACIFIC TRANSPORTATION CO., *ante*, p. 887. Motion for leave to file petition for rehearing denied.

JANUARY 13, 1987

Dismissal Under Rule 53

No. 86–516. PLAPINGER ET AL. *v.* CITIBANK, N. A., ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari dismissed under this Court's Rule 53. Reported below: 491 So. 2d 563.

JANUARY 15, 1987

Dismissal Under Rule 53

No. 85–1987. SEE ET AL. *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, *ante*, p. 811.] Writ of certiorari dismissed under this Court's Rule 53.

JANUARY 16, 1987

Miscellaneous Order

No. A–524 (86–6188). MOORE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA would deny the application.

JANUARY 20, 1987

Affirmed on Appeal

No. 86–631. CITY OF WATSEKA ET AL. *v.* ILLINOIS PUBLIC ACTION COUNCIL ET AL. Affirmed on appeal from C. A. 7th Cir. Reported below: 796 F. 2d 1547.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

The Court of Appeals for the Seventh Circuit held in this case that a city ordinance limiting door-to-door soliciting to the hours between 9 a.m. and 5 p.m., Monday through Saturday, violated the First and Fourteenth Amendments to the United States Constitution. 796 F. 2d 1547 (1986). It is undisputed that the ordinance is content neutral. The purpose of the ordinance is to protect citizens' privacy and to prevent crime, obviously legitimate governmental objectives as the Court of Appeals recognized. The Court of Appeals nevertheless concluded that the ordinance impermissibly restricted First Amendment activities because the city had less restrictive alternatives to accomplish its objectives. We have held, however, that a time, place, and manner restriction is valid if it is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication of the information, and we have not imposed the requirement that the restriction be the least restrictive means available. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293–294 (1984); see also *Regan* v. *Time, Inc.*, 468 U. S. 641, 657 (1984) ("The less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation. It is enough that the . . . restriction substantially serves the Government's legitimate ends") (opinion of WHITE, J.). Because the decision below departs from this standard, I would note probable jurisdiction.

Appeals Dismissed

No. 86–800. LUCERO ET AL. *v.* SNYDER ET AL. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–802. HOLIDAY UNIVERSAL, INC. *v.* MONTGOMERY COUNTY, MARYLAND, ET AL. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Reported below: 67 Md. App. 568, 508 A. 2d 991.

No. 86–842. SHILEY INC. *v.* CORRIGAN ET AL. Appeal from Ct. App. Cal., 2d App. Dist. Motion of California Chamber of Commerce et al. for leave to file a brief as *amici curiae* granted. Appeal dismissed for want of jurisdiction. Treating the papers

whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 182 Cal. App. 3d 166, 227 Cal. Rptr. 247.

No. 86–844. DARLAND ET UX. *v.* COMPTROLLER OF THE TREASURY, INCOME TAX DIVISION, STATE OF MARYLAND. Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. Reported below: 67 Md. App. 762.

Vacated and Remanded on Appeal

No. 84–1545. MILLER-WOHL CO., INC. *v.* COMMISSIONER OF LABOR AND INDUSTRY OF MONTANA ET AL. Appeal from Sup. Ct. Mont. Judgment vacated and case remanded for further consideration in light of *California Federal Savings & Loan Assn.* v. *Guerra*, *ante*, p. 272. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SCALIA would dismiss the appeal for want of substantial federal question. Reported below: 214 Mont. 238, 692 P. 2d 1243.

Certiorari Dismissed

No. 86–746. SHARE ET AL. *v.* BERING ET AL. Sup. Ct. Wash. Petition for writ of certiorari dismissed for want of jurisdiction. Reported below: 106 Wash. 2d 212, 721 P. 2d 918.

Miscellaneous Orders

No. — — ——. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. ET AL. *v.* FAB III CONCRETE CORP. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. — — ——. DEMOUCHETTE *v.* TEXAS; and
No. — — ——. PARKER *v.* ILLINOIS. Motions for leave to proceed *in forma pauperis* without submitting affidavits in support thereof granted.

No. D–566. IN RE DISBARMENT OF FRAZIN. Disbarment entered. [For earlier order herein, see 478 U. S. 1037.]

No. D–570. IN RE DISBARMENT OF PAYNE. Disbarment entered. [For earlier order herein, see 478 U. S. 1038.]

No. D–572. IN RE DISBARMENT OF CHASE. Disbarment entered. [For earlier order herein, see 478 U. S. 1047.]

No. D–574. IN RE DISBARMENT OF BRANNEN. Disbarment entered. [For earlier order herein, see 478 U. S. 1038.]

No. D–576. IN RE DISBARMENT OF WEISS. Disbarment entered. [For earlier order herein, see 478 U. S. 1038.]

No. D–579. IN RE DISBARMENT OF BETZ. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–587. IN RE DISBARMENT OF LITTERER. Disbarment entered. [For earlier order herein, see *ante*, p. 927.]

No. D–602. IN RE DISBARMENT OF HOLMES. It is ordered that Paul H. Holmes, of Hattiesburg, Miss., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–603. IN RE DISBARMENT OF WEINSOFF. It is ordered that Irving Weinsoff, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–604. IN RE DISBARMENT OF KORNOWSKI. It is ordered that Edward Leonard Kornowski, of Solon, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 6, Orig. NEBRASKA *v.* WYOMING ET AL. Motion for leave to file petition for an order enforcing decree and for injunctive relief granted. Defendants are allowed 60 days within which to file answers. This proceeding shall be docketed as case No. 108, Original.

No. 85–2039. UNITED STATES *v.* JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHNSON. C. A. 11th Cir. [Certiorari granted, *ante*, p. 811.] Motion of William H. Gilardy et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied.

No. 85–2068. RANKIN ET AL. *v.* MCPHERSON. C. A. 5th Cir. [Certiorari granted, *ante*, p. 913.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86-44. SHEARSON/AMERICAN EXPRESS INC. ET AL. *v.* MCMAHON ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 812.] Motion of petitioners for additional time for oral argument denied.

No. 86-88. CITICORP INDUSTRIAL CREDIT, INC. *v.* BROCK, SECRETARY OF LABOR. C. A. 6th Cir. [Certiorari granted, *ante*, p. 929.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 86-108. HILTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. *v.* BRAUNSKILL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 881.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 86-179. CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ET AL. *v.* AMOS ET AL.; and

No. 86-401. UNITED STATES *v.* AMOS ET AL. D. C. Utah. [Probable jurisdiction postponed, *ante*, p. 929.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86-270. SAN FRANCISCO ARTS & ATHLETICS, INC., ET AL. *v.* UNITED STATES OLYMPIC COMMITTEE ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 913.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 86-281. RAY *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 960.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86-341. FORT HALIFAX PACKING CO., INC. *v.* COYNE, DIRECTOR, BUREAU OF LABOR STANDARDS OF MAINE, ET AL. Sup. Jud. Ct. Me. [Probable jurisdiction noted, *ante*, p. 947.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 86-421. BOARD OF DIRECTORS OF ROTARY INTERNATIONAL ET AL. *v.* ROTARY CLUB OF DUARTE ET AL. Ct. App. Cal., 2d App. Dist. [Probable jurisdiction postponed, *ante*, p. 929.] Motion of California for divided argument granted. JUSTICE BLACKMUN and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 86–5324. GRIFFIN *v.* WISCONSIN. Sup. Ct. Wis. [Certiorari granted, *ante*, p. 1005.] Motion for appointment of counsel granted, and it is ordered that Alan G. Habermehl, Esquire, of Madison, Wis., be appointed to serve as counsel for petitioner in this case.

No. 86–5965. MORGAN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until February 10, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*. JUSTICE SCALIA took no part in the consideration or decision of this motion.

No. 86–5873. IN RE TYLER. Petition for writ of mandamus denied.

No. 86–5916. IN RE MCQUEEN. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 86–648. WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari granted. Reported below: 797 F. 2d 391.

No. 86–836. HAZELWOOD SCHOOL DISTRICT ET AL. *v.* KUHLMEIER ET AL. C. A. 8th Cir. Motion of National School Boards Association for leave to file a brief as *amicus curiae* granted. Motion of respondents for leave to file appendix to brief in opposition on oversized paper denied. Certiorari granted. Reported below: 795 F. 2d 1368.

Certiorari Denied. (See also Nos. 86–800 and 86–842, *supra*.)

No. 86–465. FLORIDA ROCK INDUSTRIES, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 791 F. 2d 893.

No. 86-476. RAILWAY LABOR EXECUTIVES' ASSN. *v.* STATEN ISLAND RAILROAD CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 7.

No. 86-542. ROBINSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 795 F. 2d 278.

No. 86-628. KATHY G. J. *v.* ARNOLD D. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 116 App. Div. 2d 247, 501 N. Y. S. 2d 58.

No. 86-634. SANGUINE, LTD. *v.* UNITED STATES DEPARTMENT OF THE INTERIOR ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 798 F. 2d 389.

No. 86-644. SELTZER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 794 F. 2d 1114.

No. 86-649. FLORIDA *v.* DIXON, AKA RATCLIFF; and
No. 86-5847. DIXON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 487 So. 2d 1195.

No. 86-671. UTSEY *v.* DEPARTMENT OF THE ARMY. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 475.

No. 86-676. GIBSON ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 781 F. 2d 1334.

No. 86-688. RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* VICKERS. C. A. 9th Cir. Certiorari denied. Reported below: 798 F. 2d 369.

No. 86-807. ROBERT K. MORROW, INC., TRUSTEE *v.* AGRI-BEEF CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 797 F. 2d 790.

No. 86-809. PAGE *v.* ORANGE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86-810. MOSLEY *v.* BARTMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 796 F. 2d 479.

No. 86-811. MOSLEY *v.* NOEL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 793 F. 2d 302.

No. 86-820. HIMMILRIGHT *v.* FOULKS. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 457.

No. 86-831. PHILLIPS PETROLEUM CO. *v.* RICHARDSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 791 F. 2d 641.

No. 86-838. NORDLICHT *v.* NEW YORK TELEPHONE CO. C. A. 2d Cir. Certiorari denied. Reported below: 799 F. 2d 859.

No. 86-845. LATTA ET AL. *v.* CITY OF ATLANTA ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 256 Ga. XXVII, 347 S. E. 2d 229.

No. 86-852. APRILE ET AL. *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 715 S. W. 2d 475.

No. 86-866. MORIARTY ET AL. *v.* FAIRFIELD COMMONS CONDOMINIUM ASSN. ET AL. Ct. App. Ohio, Lucas County. Certiorari denied. Reported below: 30 Ohio App. 3d 11, 506 N. E. 2d 237.

No. 86-872. ALLEN *v.* SPARTANBURG COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. Sup. Ct. S. C. Certiorari denied.

No. 86-906. YONAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 800 F. 2d 164.

No. 86-954. JOHNSON *v.* TINNEY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 800 F. 2d 260.

No. 86-974. ROBNETT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 468.

No. 86-5503. STEVENSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 86-5573. SINGER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 352 Pa. Super. 619, 505 A. 2d 1036.

No. 86-5621. WHALEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 779 F. 2d 585.

No. 86-5627. KIPERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 145.

No. 86-5654. BARR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 796 F. 2d 20.

No. 86-5672. HILLIARD *v.* SPALDING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1052.

No. 86–5698. CHERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 794 F. 2d 201.

No. 86–5703. DONALDSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 793 F. 2d 498.

No. 86–5722. SCHULER *v.* UNIVERSITY OF MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 788 F. 2d 510.

No. 86–5729. SEVERINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 42.

No. 86–5784. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 798 F. 2d 271.

No. 86–5786. SANCHEZ *v.* MILLER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 792 F. 2d 694.

No. 86–5864. JOLES *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 492 So. 2d 490.

No. 86–5870. DRIVER *v.* JOHNSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 86–5874. COLEMAN *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 186, 481 N. E. 2d 335.

No. 86–5875. WELLS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86–5878. JACOBS *v.* GREGG. C. A. 3d Cir. Certiorari denied.

No. 86–5881. DALEBOUT *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 301 Ore. 240, 720 P. 2d 1279.

No. 86–5883. HABER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 802 F. 2d 1397.

No. 86–5885. FOY *v.* MASCHNER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 86–5887. HARVEY *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86-5890. ANDERSON *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 86-5891. DOYLE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 86-5892. MARTIN *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 796 F. 2d 813.

No. 86-5894. SHERRICK *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 725 P. 2d 1278.

No. 86-5897. STEVENS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 394 N. W. 2d 388.

No. 86-5899. MCCLELLAN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 715 S. W. 2d 464.

No. 86-5903. MAISON *v.* HOUSEWRIGHT, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 86-5907. BROWN EL *v.* ARMONTROUT, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 86-5910. TURNER *v.* BAIR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 798 F. 2d 1409.

No. 86-5912. TERRY *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 86-5913. SUN *v.* BUSH ET AL. Ct. App. Ga. Certiorari denied. Reported below: 179 Ga. App. 80, 345 S. E. 2d 85.

No. 86-5929. BELL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 86-5933. FALU-RIVERA *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 802 F. 2d 439.

No. 86-5935. DURR *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 105 N. J. 576, 523 A. 2d 205.

No. 86-5938. RODRIGUEZ *v.* RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 798 F. 2d 1250.

No. 86–5950. BAKER *v.* UNIVERSITY OF ALABAMA AT BIRMINGHAM ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 804 F. 2d 679.

No. 86–5951. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 800 F. 2d 261.

No. 86–5966. NICHOLAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 86–5968. SEIFERT *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 86–5969. WOODFIN *v.* HARTMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 800 F. 2d 261.

No. 86–5970. ST. HILAIRE *v.* MARICOPA COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 801 F. 2d 400.

No. 86–5990. RHOADS *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 86–5998. SKOZEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 142 Ill. App. 3d 515, 491 N. E. 2d 1352.

No. 86–528. BROWN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF BROWN, ET AL. *v.* UNITED STATES; and

No. 86–202. SEA FEVER CORP. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: No. 86–528, 790 F. 2d 199; No. 86–202, 795 F. 2d 76.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

These cases present the question whether the discretionary-function exception to liability under the Federal Tort Claims Act, 28 U. S. C. § 2680(a), encompasses governmental decisions involving allocation of resources. The Court of Appeals in these cases held that such decisions are covered by the discretionary-function exception. 790 F. 2d 199, 202 (CA1 1986). Other Courts of Appeals have rejected this view. See *Eklof Marine Corp.* v. *United States*, 762 F. 2d 200, 204 (CA2 1985). See also *Aslakson* v. *United States*, 790 F. 2d 688, 693 (CA8 1986). I would grant one of these petitions to resolve the conflict.

No. 86–629. SEATTLE MASTER BUILDERS ASSN. ET AL. *v.* PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 786 F. 2d 1359.

No. 86–646. TWC HOLDINGS, INC. *v.* JOHN F. HARKINS CO., INC. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 796 F. 2d 657.

No. 86–703. INTERNATIONAL OILFIELD DIVERS, INC., ET AL. *v.* PICKLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 791 F. 2d 1237.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

The Jones Act, 38 Stat. 1185, as amended, 46 U. S. C. § 688(a), provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . ." This case presents the question of who is a "seaman" for purposes of the Jones Act.

The Court of Appeals for the Fifth Circuit, both in this case and in its previous cases, has taken an expansive view in defining who is a seaman. The Fifth Circuit, relying on its earlier opinion in *Offshore Co.* v. *Robison*, 266 F. 2d 769 (1959), has taken the position that to be a seaman, a person need not assist in the transportation function of a vessel. See *Barrett* v. *Chevron, U. S. A., Inc.*, 781 F. 2d 1067, 1073 (1986) (en banc). Other Courts of Appeals, particularly the Third and Seventh Circuits, have rejected this view and require that before a plaintiff can sue under the Jones Act, he must be employed in such a way as to assist in the navigational function of a vessel. See *Johnson* v. *John F. Beasley Construction Co.*, 742 F. 2d 1054, 1061 (CA7 1984) ("[W]e think the second part of the *Robison* test strays from important Jones Act principles when it speaks of the employee's duties as having to relate only to the 'function of the vessel or the accomplishment of its mission' without further qualifying 'function' and 'mission' in terms of the *transportation* function and mission of the vessel") (emphasis in original), cert. denied, 469 U. S. 1211 (1985); *Simko* v. *C & C Marine Maintenance Co.*, 594 F. 2d 960, 964–965 (CA3), cert. denied, 444 U. S. 833 (1979). There is even dis-

agreement within the Fifth Circuit over this point. See *Barrett*, *supra*, at 1076 (Gee, J., specially concurring).

Because of the direct split among the Courts of Appeals, I would grant the petition.

No. 86-814. WHITE MOUNTAIN APACHE TRIBE ET AL. *v.* ARIZONA STATE TRANSPORTATION BOARD ET AL. C. A. 9th Cir. Motion of Ak-Chin Indian Community et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 798 F. 2d 1205.

No. 86-818. FALCON INSURANCE CO. ET AL. *v.* ELI LILLY & CO. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 254 U. S. App. D. C. 1, 794 F. 2d 710.

No. 86-822. HOME INSURANCE CO. ET AL. *v.* ELI LILLY & CO. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 254 U. S. App. D. C. 1, 794 F. 2d 710.

No. 86-855. JACOBSEN ET AL. *v.* ANHEUSER-BUSCH, INC. Sup. Ct. Minn. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 392 N. W. 2d 868.

No. 86-5620. MCLEAN-DAVIS *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 785 F. 2d 1534 and 795 F. 2d 957.

Rehearing Denied

No. 86-517. BOLES *v.* ELLIS ET AL., *ante*, p. 962;

No. 86-5431. MARTIN *v.* SEARS, ROEBUCK & CO., *ante*, p. 990;

No. 86-5453. TICHNELL *v.* MARYLAND, *ante*, p. 995;

No. 86-5589. TAYLOR *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 990;

No. 86-5597. BECKER *v.* SUFFOLK COUNTY LEGAL AID DIVISION, *ante*, p. 991;

No. 86-5605. BECKER *v.* ARCADIAN GARDENS, *ante*, p. 991;

No. 86-5606. BECKER *v.* HENRY MODELLS & CO., INC., *ante*, p. 991; and

No. 86-5838. IN RE CLOUGH, *ante*, p. 1004. Petitions for rehearing denied.

JANUARY 27, 1987

Appeals Dismissed

No. 86–894. HELDSTAB *v.* CITY OF MILWAUKEE. Appeal from Ct. App. Wis. dismissed for want of jurisdiction. Reported below: 132 Wis. 2d 480, 392 N. W. 2d 849.

No. 86–950. WINCHESTER & WESTERN RAILROAD CO. *v.* VIRGINIA ET AL. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. JUSTICE WHITE would postpone jurisdiction to a hearing of the case on the merits.

No. 86–5919. STOKES *v.* ASSOCIATE CIRCUIT COURT OF TEXAS COUNTY, MISSOURI. Appeal from Ct. App. Mo., Southern Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–5977. STEVENSON *v.* GRISWOLD. Appeal from Sup. Ct. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–5978. MCDONALD *v.* ALABAMA. Appeal from Ct. Crim. App. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 492 So. 2d 673.

No. 86–6000. POTE *v.* REAGAN, PRESIDENT OF THE UNITED STATES. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 85–1480. UNITED STATES *v.* MERCHANTS NATIONAL BANK OF MOBILE. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jersey Shore State Bank* v. *United States*, *ante*, p. 442. Reported below: 772 F. 2d 1522.

No. 86–57. TENNESSEE ET AL. *v.* CHAMPION INTERNATIONAL CORP., DBA CHAMPION PAPERS. Sup. Ct. Tenn. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *International Paper Co.* v. *Ouellette*, *ante*, p. 481. Reported below: 709 S. W. 2d 569.

Miscellaneous Orders

No. D–562. IN RE DISBARMENT OF DRAKE. Disbarment entered. [For earlier order herein, see 478 U. S. 1034.]

No. D–583. IN RE DISBARMENT OF GONZALES. Alphonse C. Gonzales, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on November 3, 1986 [*ante*, p. 926], is hereby discharged.

No. D–585. IN RE DISBARMENT OF REYNOLDS. Disbarment entered. [For earlier order herein, see *ante*, p. 927.]

No. D–590. IN RE DISBARMENT OF KAZDOY. Disbarment entered. [For earlier order herein, see *ante*, p. 958.]

No. 86–44. SHEARSON/AMERICAN EXPRESS INC. ET AL. *v.* MCMAHON ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 812.] Motion of Willie D. Chandler et al. for leave to file a brief as *amici curiae* granted.

No. 86–87. UNITED STATES *v.* SALERNO ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 929.] Motion of respondent Cafaro to join brief of respondent Salerno granted.

No. 86–341. FORT HALIFAX PACKING CO., INC. *v.* COYNE, DIRECTOR, BUREAU OF LABOR STANDARDS OF MAINE, ET AL. Sup. Jud. Ct. Me. [Probable jurisdiction noted, *ante*, p. 947.] Motion of Chamber of Commerce of the United States of America for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 86–480. DARBY DENTAL SUPPLY CO., INC., ET AL. *v.* PREMIER DENTAL PRODUCTS CO., *ante*, p. 950. Motion of petitioner to direct the Clerk to file a petition for rehearing out of time denied.

No. 86–5344. MILLER *v.* FLORIDA. Sup. Ct. Fla. [Certiorari granted, *ante*, p. 960.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

Probable Jurisdiction Postponed

No. 85–1551. KARCHER, SPEAKER OF THE NEW JERSEY GENERAL ASSEMBLY, ET AL. *v.* MAY ET AL. Appeal from C. A. 3d

Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 780 F. 2d 240.

Certiorari Granted

No. 86-740. OMNI CAPITAL INTERNATIONAL, LTD., ET AL. *v.* RUDOLF WOLFF & CO., LTD., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 795 F. 2d 415.

No. 86-890. DEAKINS ET AL. *v.* MONAGHAN ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 798 F. 2d 632.

No. 86-964. THOMPSON *v.* THOMPSON, AKA CLAY. C. A. 9th Cir. Certiorari granted. Reported below: 798 F. 2d 1547.

No. 86-472. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* INTERNAL REVENUE SERVICE. C. A. D. C. Cir. Certiorari granted. JUSTICE BRENNAN and JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 253 U. S. App. D. C. 85, 792 F. 2d 153.

No. 86-5963. TAYLOR *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 141 Ill. App. 3d 839, 491 N. E. 2d 3.

Certiorari Denied. (See also Nos. 86-5919, 86-5977, 86-5978, and 86-6000, *supra.*)

No. 85-1633. MERCHANTS NATIONAL BANK OF MOBILE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 1522.

No. 85-1948. DUNNING, DIRECTOR OF THE NEBRASKA DEPARTMENT OF PUBLIC WELFARE, ET AL. *v.* NEBRASKA HEALTH CARE ASSN., INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 778 F. 2d 1291.

No. 85-6394. MURALT *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 376 N. W. 2d 25.

No. 86-76. BRANCH BANKING & TRUST CO. ET AL. *v.* NATIONAL CREDIT UNION ADMINISTRATION BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 621.

No. 86-209. HUNTER ENGINEERS & CONSTRUCTORS, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 789 F. 2d 1436.

No. 86–478. FIRST NATIONAL BANK OF CHICAGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 954.

No. 86–520. TERRELL *v.* UNIVERSITY OF TEXAS SYSTEM POLICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 792 F. 2d 1360.

No. 86–558. YAMAMOTO *v.* KLENSKE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 781 F. 2d 1370.

No. 86–575. MCCLELLAN *v.* WEST VIRGINIA. Cir. Ct. W. Va., Jefferson County. Certiorari denied.

No. 86–689. AMERICAN SAVINGS & LOAN ASSN. *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR SAN MARINO SAVINGS & LOAN ASSN. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 180 Cal. App. 3d 336, 225 Cal. Rptr. 422.

No. 86–696. FIDELITY FINANCIAL CORP. *v.* FEDERAL HOME LOAN BANK OF SAN FRANCISCO. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1432.

No. 86–709. YAMAMOTO *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1018.

No. 86–711. PECORA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 798 F. 2d 614.

No. 86–724. HERAEUS-AMERSIL, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1575.

No. 86–729. JOSEPH *v.* ALEXANDER ET AL. Ct. App. Ohio, Stark County. Certiorari denied.

No. 86–738. CAUCUS DISTRIBUTORS, INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 795 F. 2d 226.

No. 86–745. VERMONT DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 798 F. 2d 57.

No. 86-788. PERRY *v.* ALABAMA POWER CO. C. A. 11th Cir. Certiorari denied. Reported below: 792 F. 2d 1124.

No. 86-823. MOBIL OIL CORP. *v.* BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 492 So. 2d 339.

No. 86-827. JAIN *v.* ITT GRINNELL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 797 F. 2d 975.

No. 86-840. ROZAY'S TRANSFER *v.* SOUTHWEST ADMINISTRATORS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 769.

No. 86-841. BATH IRON WORKS CORP. ET AL. *v.* BOUFORD. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 514 A. 2d 470.

No. 86-856. DARMSTADTER *v.* SOUTH CAROLINA NATIONAL BANK. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 403.

No. 86-858. REEDER *v.* KANSAS CITY BOARD OF POLICE COMMISSIONERS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 796 F. 2d 1050.

No. 86-859. KOVAC *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 795 F. 2d 1509.

No. 86-860. WALKER *v.* ACTION INDUSTRIES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 802 F. 2d 703.

No. 86-861. L & L MARINE SERVICE, INC. *v.* INSURANCE COMPANY OF NORTH AMERICA. C. A. 8th Cir. Certiorari denied. Reported below: 796 F. 2d 1032.

No. 86-865. JONES *v.* FLAGSHIP INTERNATIONAL, DBA SKY CHEFS. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 714.

No. 86-869. D'ANGELO *v.* DISCIPLINARY BOARD OF SUPREME COURT OF NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 105 N. M. 391, 733 P. 2d 360.

No. 86-875. ARTHUR ANDERSEN & CO. *v.* MANUFACTURERS HANOVER TRUST CO. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 13.

No. 86-889. HOWE *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 802 F. 2d 440.

No. 86-915. LEAR *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 798 F. 2d 1128.

No. 86-917. C. F. BEAN CORP. *v.* DRAGADOS, S. A., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 798 F. 2d 472.

No. 86-918. CITY AND COUNTY OF SAN FRANCISCO ET AL. *v.* CHRISTIAN SCIENCE READING ROOM JOINTLY MAINTAINED ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 1010 and 792 F. 2d 124.

No. 86-920. DAKMAK, TRUSTEE FOR BOSTICK FOUNDRY CO. *v.* LINDBERG, A DIVISION OF SOLA BASIC INDUSTRIES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 797 F. 2d 280.

No. 86-927. WILKS ET AL. *v.* MOUTON ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 42 Cal. 3d 400, 722 P. 2d 187.

No. 86-930. ILLINOIS *v.* EALY. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 146 Ill. App. 3d 557, 497 N. E. 2d 101.

No. 86-933. DALE *v.* CHICAGO TRIBUNE CO. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 458.

No. 86-951. PERL *v.* WERNZ, DIRECTOR OF LAWYERS PROFESSIONAL RESPONSIBILITY, ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 394 N. W. 2d 487.

No. 86-955. STEAG HANDEL GMBH *v.* HAWLEY FUEL COALMART, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 796 F. 2d 29.

No. 86-983. WEYTKOW *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 141 Ill. App. 3d 1174, 503 N. E. 2d 1214.

No. 86-1029. MCNUTT *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 86–1044. VREEKEN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 803 F. 2d 1085.

No. 86–1046. SANTACROCE, SHERIFF OF NASSAU COUNTY, ET AL. *v.* BADGLEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 33.

No. 86–1067. ATISHA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 804 F. 2d 920.

No. 86–5510. FELDMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 544.

No. 86–5723. MOORE *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 792 F. 2d 140.

No. 86–5736. BURKE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 86–5825. FRANCIS *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 391.

No. 86–5871. CURAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 801 F. 2d 396.

No. 86–5877. JACKSON *v.* GAUGHAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 808 F. 2d 1512.

No. 86–5879. BUZZELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 802 F. 2d 449.

No. 86–5895. SERRANO-TELLEZ *v.* YOUNG, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 459.

No. 86–5904. MUZA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 86–5918. VALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 796 F. 2d 24.

No. 86–5921. RUTA *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 22 Mass. App. 1110, 495 N. E. 2d 334.

No. 86–5931. BLAKEY *v.* VASSAR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 804 F. 2d 677.

No. 86–5934. ADAMS *v.* HAMILTON, SUPERINTENDENT, HARNETT YOUTH CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 713.

No. 86–5939. THOMAS *v.* LINCOLN UNIVERSITY. C. A. 8th Cir. Certiorari denied.

No. 86–5941. MITCHELL *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 81 Ore. App. 108, 724 P. 2d 350.

No. 86–5944. MAGGARD *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 800 F. 2d 195.

No. 86–5945. COOPER *v.* WOODALL. C. A. 11th Cir. Certiorari denied.

No. 86–5947. KEALOHAPAUOLE *v.* SHIMODA, ADMINISTRATOR, OAHU COMMUNITY CORRECTIONAL CENTER, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 1463.

No. 86–5948. HARVEY *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86–5949. HARVEY *v.* TEXAS COURT OF CRIMINAL APPEALS. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 260.

No. 86–5954. CHUA HAN MOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 796 F. 2d 478.

No. 86–5955. COOPER *v.* LAMBERT, CHAIRMAN, ALABAMA BOARD OF PARDONS AND PAROLES, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86–5956. EPPS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 68 N. Y. 2d 914, 501 N. E. 2d 607.

No. 86–5957. CALVER *v.* RIDGECREST MOBILE HOME PARK ET AL. C. A. 5th Cir. Certiorari denied.

No. 86–5962. KAHEY ET AL. *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 86-5971. HINES *v.* REDMAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1034.

No. 86-5972. PATTERSON *v.* BRADY. C. A. 4th Cir. Certiorari denied.

No. 86-5973. SELLNER *v.* PANAGOULIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 800 F. 2d 377.

No. 86-5975. MOORE *v.* THIERET, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 799 F. 2d 753.

No. 86-5980. CREEL *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied.

No. 86-5981. FRITTS *v.* FEDERAL CORRECTIONAL INSTITUTE, LA TUNA, TEXAS-NEW MEXICO. C. A. 7th Cir. Certiorari denied.

No. 86-5995. GREEN *v.* EDWARD J. BETTINGER CO. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 917.

No. 86-6002. PATEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 802 F. 2d 466.

No. 86-6004. SABATKA *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 1295.

No. 86-6005. PROCUP *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 496 So. 2d 143.

No. 86-6012. LEAVITT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 799 F. 2d 1494.

No. 86-6021. HYLAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 86-6024. ROSBERG *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 223 Neb. xxv.

No. 86-6029. ROONEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 801 F. 2d 396.

No. 86-6037. SELLNER *v.* PANAGOULIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 474.

No. 86-6040. ANDERSSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 803 F. 2d 903.

No. 86–891. MEAD DATA CENTRAL, INC. *v.* WEST PUBLISHING CO. C. A. 8th Cir. Motion of Lawyers Co-operative Publishing Co. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 799 F. 2d 1219.

No. 86–900. LABRANCHE *v.* UNITED STATES OLYMPIC COMMITTEE. C. A. 9th Cir. Certiorari before judgment denied.

No. 86–5819. PETERKIN *v.* PENNSYLVANIA ET AL. Sup. Ct. Pa.;

No. 86–5833. BEVINS *v.* KENTUCKY. Sup. Ct. Ky.;

No. 86–5901. FUGITT *v.* GEORGIA. Sup. Ct. Ga.; and

No. 86–6061. ROMERO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 86–5819, 511 Pa. 299, 513 A. 2d 373; No. 86–5833, 712 S. W. 2d 932; No. 86–5901, 256 Ga. 292, 348 S. E. 2d 451; No. 86–6061, 716 S. W. 2d 519.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 86–5841. PARKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 255 U. S. App. D. C. 343, 801 F. 2d 1382.

No. 86–5865. FORD *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 797 F. 2d 1329.

Rehearing Denied

No. 85–1524. HUBBARD BROADCASTING, INC. *v.* SOUTHERN SATELLITE SYSTEMS, INC., ET AL., *ante*, p. 1005;

No. 86–173. HARRIS *v.* ATTORNEY GENERAL OF VIRGINIA ET AL., *ante*, p. 994;

No. 86–336. LINNAS *v.* IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 995; and

No. 86–375. WHITE MOUNTAIN APACHE TRIBE *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL., *ante*, p. 1006. Petitions for rehearing denied.

No. 86–521. DISALVO *v.* UNITED STATES, *ante*, p. 985;
No. 86–586. HUDSON *v.* EDGETT ET AL., *ante*, p. 979;
No. 86–610. BREAUX, ATTORNEY FOR BOSWELL *v.* ALLIED BANK OF TEXAS, *ante*, p. 1002;
No. 86–5642. PETERSEN *v.* ATLANTIC GULF & PACIFIC CO. ET AL., *ante*, p. 980;
No. 86–5696. PANNACCI *v.* THORP CONSUMER DISCOUNT CO., *ante*, p. 1010;
No. 86–5710. ASHLEY *v.* ARMSTRONG, CONTROLLER OF THE COLORADO DEPARTMENT OF LABOR, ET AL., *ante*, p. 1011; and
No. 86–5755. SYKES *v.* VAN DE WATER ET AL., *ante*, p. 1020. Petitions for rehearing denied.

No. 86–5062. BENNETT *v.* CHARLES ET AL., *ante*, p. 858. Petition for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of this petition.

JANUARY 30, 1987

Miscellaneous Order

No. A–552. LOVELACE, NEXT FRIEND OF HERNANDEZ *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application. JUSTICE WHITE and JUSTICE STEVENS took no part in the consideration or decision of this application.

FEBRUARY 10, 1987

Miscellaneous Order

No. A–565 (86–6300). JOHNSON *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. THE CHIEF JUS-

TICE, JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE SCALIA would deny the application.

FEBRUARY 17, 1987

Dismissal Under Rule 53

No. 86-1083. H. H. ROBERTSON CO. *v.* GLAROS. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 797 F. 2d 1564.

FEBRUARY 23, 1987

Appeals Dismissed

No. 86-568. POTTER *v.* ABSHIRE. Appeal from Ct. App. Cal., 5th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 179 Cal. App. 3d 73, 224 Cal. Rptr. 312.

No. 86-1131. FINCHER *v.* FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 798 F. 2d 1371.

No. 86-6049. PRUITT *v.* UNITED STATES STEEL CORP. ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 791 F. 2d 920.

No. 86-6133. GIACOMMOZZI *v.* ROLLINS. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 808 F. 2d 1512.

No. 86-6150. POPESCU *v.* NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86-691. TOBIN LANDSCAPE & CONSTRUCTION CO., INC. *v.* BRAMLETT. Appeal from Ct. App. Tex., 5th Dist., dismissed for want of substantial federal question. Reported below: 708 S. W. 2d 553.

No. 86-994. WALKBROADWAY REALTY, INC. *v.* CITY OF NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 120 App. Div. 2d 998, 502 N. Y. S. 2d 317.

No. 86-1031. EWING ET AL. *v.* LINDLEY, TAX COMMISSIONER OF OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 23 Ohio St. 3d 222, 492 N. E. 2d 435.

No. 86-1095. KOHRIG *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 113 Ill. 2d 384, 498 N. E. 2d 1158.

No. 86-6007. DELANEY *v.* OREGON. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. Reported below: 301 Ore. 765, 726 P. 2d 377.

No. 86-6106. CHAPMAN *v.* SOUTH CAROLINA TAX COMMISSION ET AL. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question.

No. 86-943. AMERADA HESS CORP. ET AL. *v.* CORPORATION COMMISSION OF THE STATE OF OKLAHOMA. Appeal from Sup. Ct. Okla. dismissed for want of properly presented federal question. Reported below: 725 P. 2d 278.

No. 86-1038. BAKER ET AL. *v.* CITY OF SANTA MONICA ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of properly presented federal question. Reported below: 181 Cal. App. 3d 972, 226 Cal. Rptr. 755.

No. 86-960. HIGH TIDE SEAFOODS ET AL. *v.* WASHINGTON ET AL. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 106 Wash. 2d 695, 725 P. 2d 411.

No. 86-1079. KOCZAK ET AL. *v.* DIXON ET AL. Appeal from C. A. 3d Cir. Motions of National Legal Foundation and Center for Judicial Studies for leave to file briefs as *amici curiae* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 802 F. 2d 447.

No. 86–1122. SMITH, ADMINISTRATRIX OF THE ESTATE OF SMITH, ET AL. *v.* CITY OF PHILADELPHIA ET AL. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Reported below: 512 Pa. 129, 516 A. 2d 306.

Certiorari Granted—Vacated and Remanded

No. 84–6504. MACK *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 105 Ill. 2d 103, 473 N. E. 2d 880.

No. 84–6536. WHITE *v.* ALABAMA. Ct. Crim. App. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 462 So. 2d 750.

No. 84–6633. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 682 S. W. 2d 538.

No. 84–6732. ORJI *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 756 F. 2d 880.

No. 85–1663. TOLLIVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 780 F. 2d 1177.

No. 85–1961. LESLIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 783 F. 2d 541.

No. 85–5190. NURSE ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 131 Ill. App. 3d 590, 475 N. E. 2d 1000.

No. 85–5940. HOLMES *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 133 Ill. App. 3d 1164, 496 N. E. 2d 22.

No. 85–5949. WHITE *v.* MISSOURI. Ct. App. Mo., Western Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 694 S. W. 2d 802.

No. 85–6253. FORD *v.* GEORGIA. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 255 Ga. 81, 335 S. E. 2d 567.

No. 85–6315. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 136 Ill. App. 3d 126, 483 N. E. 2d 306.

No. 85–6350. PODBORNY *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314.

No. 85–6475. CALDWELL *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314, and *Allen* v. *Hardy*, 478 U. S. 255 (1986). Reported below: 481 So. 2d 850.

No. 85–6549. EVANS *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 780 F. 2d 425.

No. 85–6552. JACKSON *v.* OHIO. Ct. App. Ohio, Hamilton County. Motion of petitioner for leave to proceed *in forma pau-*

peris and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314.

No. 85–6558. TINSLEY *v.* VIRGINIA. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314.

No. 85–6642. ALLEN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 137 Ill. App. 3d 823, 485 N. E. 2d 469.

No. 85–6645. GRANDISON *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 780 F. 2d 425.

No. 85–6660. GREEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 136 Ill. App. 3d 361, 483 N. E. 2d 606.

No. 85–6678. WALKER *v.* OHIO. Ct. App. Ohio, Stark County. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314.

No. 86–5095. KELLY *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 780 F. 2d 425.

No. 86–5198. KIRK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 141 Ill. App. 3d 971, 491 N. E. 2d 78.

No. 86–5255. ALLEN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 787 F. 2d 933.

No. 86–5266. HINES *v.* ALABAMA. Ct. Crim. App. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 487 So. 2d 970.

No. 86–5345. JACKSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 317 N. C. 1, 343 S. E. 2d 814.

No. 86–5374. FORD *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, *ante*, p. 314. Reported below: 489 So. 2d 1250.

Miscellaneous Orders

No. — — ——. BULLEN *v.* DEREGO ET AL. Motion to direct the Clerk to file the petition for writ of certiorari without an affidavit of indigency granted.

No. A–518. SCHWANDER ET AL. *v.* CORDOVA. C. A. 9th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–567. IN RE DISBARMENT OF KIRWAN. Disbarment entered. [For earlier order herein, see 478 U. S. 1037.]

No. D–575. IN RE DISBARMENT OF SICKMEN. Disbarment entered. [For earlier order herein, see 478 U. S. 1038.]

No. D–577. IN RE DISBARMENT OF HARRISON. Disbarment entered. [For earlier order herein, see 478 U. S. 1038.]

No. D–582. IN RE DISBARMENT OF GOODSTEIN. Disbarment entered. [For earlier order herein, see *ante*, p. 926.]

No. D–584. IN RE DISBARMENT OF FAWELL. Disbarment entered. [For earlier order herein, see *ante*, p. 927.]

No. D–593. IN RE DISBARMENT OF CHRISTNER. Disbarment entered. [For earlier order herein, see *ante*, p. 1003.]

No. D–595. IN RE DISBARMENT OF HARTMAN. Ronald L. Hartman, of Encino, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 12, 1987 [*ante*, p. 1025], is hereby discharged.

No. D–605. IN RE DISBARMENT OF CLARKE. It is ordered that David Ross Clarke, of Belton, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–606. IN RE DISBARMENT OF KNOWLES. It is ordered that Robert E. Knowles, of Bradenton, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–607. IN RE DISBARMENT OF EIMERS. It is ordered that Robert F. Eimers, of Coconut Grove, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, *ante*, p. 806.]

No. 94, Orig. SOUTH CAROLINA *v.* BAKER, SECRETARY OF THE TREASURY. Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, with supporting briefs, may be filed within 30 days. [For earlier order herein, see, *e. g.*, 469 U. S. 1083.]

No. 107, Orig. MICHIGAN *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES. Motion for leave to file bill of complaint denied.

No. 85–1626. GOODMAN ET AL. *v.* LUKENS STEEL CO. ET AL.; and

No. 85–2010. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. *v.* GOODMAN ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 982.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 86–44. SHEARSON/AMERICAN EXPRESS INC. ET AL. *v.* MCMAHON ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 812.] Motion of Bruce Cordray et al. for leave to file a brief as *amici curiae* granted.

No. 86–71. CTS CORP. *v.* DYNAMICS CORPORATION OF AMERICA; and

No. 86–97. INDIANA *v.* DYNAMICS CORPORATION OF AMERICA. C. A. 7th Cir. [Probable jurisdiction noted, *ante*, p. 810.] Motion of appellants for divided argument granted.

No. 86–98. RIVERA *v.* MINNICH. Sup. Ct. Pa. [Probable jurisdiction noted, *ante*, p. 960.] Motion of Oregon for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 86–130. ROCK *v.* ARKANSAS. Sup. Ct. Ark. [Certiorari granted, *ante*, p. 947.] Motion of Product Liability Advisory Council et al. for leave to file a brief as *amici curiae* granted.

No. 86–179. CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ET AL. *v.* AMOS ET AL.; and

No. 86–401. UNITED STATES *v.* AMOS ET AL. D. C. Utah. [Probable jurisdiction postponed, *ante*, p. 929.] Motion of the Solicitor General for divided argument granted, and the time is to be divided as follows: 15 minutes for appellants in No. 86–179 and 15 minutes for the Solicitor General in No. 86–401.

No. 86–234. MCNALLY *v.* UNITED STATES; and

No. 86–286. GRAY *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, *ante*, p. 1005.] Motion of petitioners for divided argument denied.

No. 86–243. CITY OF HOUSTON, TEXAS *v.* HILL. C. A. 5th Cir. [Probable jurisdiction noted, *ante*, p. 811.] Motion of Na-

tional Institute of Municipal Law Officers for leave to file a brief as *amicus curiae* out of time denied.

No. 86-322. CRAWFORD FITTING CO. ET AL. *v.* J. T. GIBBONS, INC.; and

No. 86-328. CHAMPION INTERNATIONAL CORP. *v.* INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, CLC, ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 983.] Motion of respondents for divided argument granted. Motion of petitioners for divided argument granted.

No. 86-327. MULLINS COAL CO., INC. OF VIRGINIA, ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1029.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 86-357. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* SCHEINER, SECRETARY, DEPARTMENT OF REVENUE OF PENNSYLVANIA, ET AL. Sup. Ct. Pa. [Probable jurisdiction noted, *ante*, p. 947.] Motion of Yellow Freight System, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 86-440. BECHTEL, INC. *v.* WEBSTER ET AL. C. A. 9th Cir. Motion of the parties to defer consideration of the petition for writ of certiorari granted for 90 days.

No. 86-475. FRAZIER *v.* HEEBE, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 960.] Motion of American Corporate Counsel Association for leave to file a brief as *amicus curiae* granted.

No. 86-497. AGENCY HOLDING CORP. ET AL. *v.* MALLEY-DUFF & ASSOCIATES, INC.; and

No. 86-531. CROWN LIFE INSURANCE CO. ET AL. *v.* MALLEY-DUFF & ASSOCIATES, INC., ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 983.] Motion of petitioners for divided argument granted, and the time is to be divided as follows: 10 minutes for petitioners in No. 86-497 and 20 minutes for petitioners in No. 86-531.

No. 86-940. PACIFIC FIRST FEDERAL SAVINGS BANK ET AL. *v.* REMBOLD ET AL. C. A. 9th Cir.;

No. 86-958. NORWEST BANK WORTHINGTON ET AL. *v.* AHLERS ET UX. C. A. 8th Cir.;

No. 86-978. GARDEBRING, COMMISSIONER OF THE MINNESOTA DEPARTMENT OF HUMAN SERVICES *v.* JENKINS. C. A. 8th Cir.;

No. 86-1052. VOLKSWAGENWERK AKTIENGESELLSCHAFT *v.* SCHLUNK, ADMINISTRATOR OF THE ESTATES OF SCHLUNK ET AL. App. Ct. Ill., 1st Dist.; and

No. 86-1115. LOUISIANA LAND & EXPLORATION CO. *v.* TEXACO INC. Sup. Ct. La. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 86-5020. BOOTH *v.* MARYLAND. Ct. App. Md. [Certiorari granted, *ante*, p. 882.] Motion of Stephanie Roper Foundation, Inc., for leave to file a brief as *amicus curiae* out of time granted.

No. 86-5999. TURNER *v.* PANSOPHIC SYSTEMS, INC. C. A. 7th Cir.; and

No. 86-6032. GELB *v.* ROYAL GLOBE INSURANCE CO. C. A. 2d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 16, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 86-6066. WRENN *v.* CHRISTIAN HOSPITAL NE-NW ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 16, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari

without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86-6093. PRESSER *v.* MONTGOMERY WARD & CO., INC. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 16, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86-1025. IN RE POLYAK. C. A. 6th Cir. Petition for writ of common-law certiorari denied. Reported below: 782 F. 2d 1043.

No. 86-6161. IN RE HUMPHREY; and
No. 86-6261. IN RE SOGOIAN. Petitions for writs of habeas corpus denied.

No. 86-6011. IN RE GRISSO;
No. 86-6111. IN RE SEITU; and
No. 86-6123. IN RE JOHL. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 86-781. KANSAS GAS & ELECTRIC CO. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL.; and
No. 86-793. KANSAS CITY POWER & LIGHT CO. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL. Appeals from Sup. Ct. Kan. Motion of Edison Electric Institute for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE POWELL took no part in the consideration or decision of this motion and these cases. Reported below: 239 Kan. 483, 720 P. 2d 1063.

No. 86-1034. VIRGINIA *v.* AMERICAN BOOKSELLERS ASSN., INC., ET AL. Appeal from C. A. 4th Cir. Probable jurisdiction

noted. In addition to the question presented on appeal, the parties are directed to brief and argue the question of appellees' standing. Reported below: 802 F. 2d 691.

Certiorari Granted

No. 86-761. FORRESTER *v.* WHITE. C. A. 7th Cir. Certiorari granted. Reported below: 792 F. 2d 647.

No. 86-803. BOOS ET AL. *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 255 U. S. App. D. C. 19, 798 F. 2d 1450.

No. 86-863. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* KIZER, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 781 F. 2d 1421.

No. 86-937. UNITED STATES *v.* ROBINSON. C. A. 6th Cir. Certiorari granted. Reported below: 794 F. 2d 1132.

No. 86-986. SCHNEIDEWIND ET AL. *v.* ANR PIPELINE CO. ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 801 F. 2d 228.

No. 86-987. HAIG ET AL. *v.* BISSONETTE ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 800 F. 2d 812.

No. 86-1021. CARNEGIE-MELLON UNIVERSITY ET AL. *v.* COHILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari granted.

No. 86-1108. VERMONT *v.* COX. Sup. Ct. Vt. Certiorari granted. Reported below: 147 Vt. 421, 519 A. 2d 1144.

No. 85-2079. LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA ET AL. *v.* ADVANCED LIGHTWEIGHT CONCRETE CO., INC. C. A. 9th Cir. Motions of National Coordinating Committee for Multiemployer Plans, Laborers International Union of North America National (Industrial) Pension Fund, and Construction Laborers' Trust Funds for Southern California for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 779 F. 2d 497.

No. 86-279. BASIC INC. ET AL. *v.* LEVINSON ET AL. C. A. 6th Cir. Certiorari granted. THE CHIEF JUSTICE took no part

in the consideration or decision of this petition. Reported below: 786 F. 2d 741.

No. 86-728. HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION *v.* DOE ET AL. C. A. 9th Cir. Certiorari granted limited to Questions 1 and 3 presented by the petition. Reported below: 793 F. 2d 1470.

No. 86-870. PHILLIPS PETROLEUM CO. ET AL. *v.* MISSISSIPPI ET AL. Sup. Ct. Miss. Motions of Robert E. Longino, Jr., and City of Elizabeth, New Jersey, et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 491 So. 2d 508.

No. 86-877. UNITED STATES *v.* OWENS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 789 F. 2d 750.

No. 86-6169. THOMPSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 724 P. 2d 780.

Certiorari Denied. (See also Nos. 86-568, 86-1131, 86-6049, 86-6133, 86-6150, 86-1079, and 86-1025, *supra*.)

No. 85-2001. EVANS *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 17 Ark. App. xvii.

No. 86-239. CHEMICAL MANUFACTURERS ASSN. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 86-608. CHICAGO ASSOCIATION OF COMMERCE & INDUSTRY ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 790 F. 2d 289.

No. 86-532. CITY OF LOS ANGELES ET AL. *v.* BUTTLER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86-565. MANSON, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTIONS *v.* ALSTON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 791 F. 2d 255.

No. 86-652. MARYLAND *v.* CLARK. Ct. App. Md. Certiorari denied. Reported below: 306 Md. 483, 510 A. 2d 243.

No. 86-680. CLANCY *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied.

No. 86–735. ALLEGHENY ELECTRIC COOPERATIVE, INC. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.;
No. 86–736. METROPOLITAN TRANSPORTATION AUTHORITY *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and
No. 86–942. RHODE ISLAND PUBLIC UTILITIES COMMISSION ET AL. *v.* METROPOLITAN TRANSPORTATION AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 796 F. 2d 584.

No. 86–741. BINKER, AKA MANOLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 795 F. 2d 1218.

No. 86–749. BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY *v.* ALABAMA STATE BOARD OF EDUCATION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 1450.

No. 86–762. CARDO *v.* MURPHY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 2.

No. 86–763. SPURLOCK *v.* WREN. C. A. 10th Cir. Certiorari denied. Reported below: 798 F. 2d 1313.

No. 86–775. MARSH MEDIA, LTD. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 798 F. 2d 772.

No. 86–792. KOPPEL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 2d 391.

No. 86–808. MARCHINI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 797 F. 2d 759.

No. 86–819. GLOVER BOTTLED GAS CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 391.

No. 86–825. JONES ET AL. *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 23 M. J. 156.

No. 86–826. THOMAS ET AL. *v.* UNITED STATES; IVY *v.* UNITED STATES; SMITH *v.* UNITED STATES; THOMPSON *v.* UNITED STATES; DEFIBAUGH *v.* UNITED STATES; MCCALLUM *v.* UNITED STATES; HOLMES *v.* UNITED STATES; SCHLOTE *v.* UNITED STATES; and SHEPHERD *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 388 (first case); 23 M. J. 153 (second case); 23 M. J. 163 (third case); 23

M. J. 153 (fourth case); 23 M. J. 180 (fifth case); 23 M. J. 156 (sixth case); 23 M. J. 152 (seventh case); 23 M. J. 155 (eighth case); 23 M. J. 155 (ninth case).

No. 86-834. NEW JERSEY DISTRICT COURT ASSN., INC., ET AL. *v.* SUPREME COURT OF NEW JERSEY ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 208 N. J. Super. 527, 506 A. 2d 742.

No. 86-835. THOMPSON MEDICAL CO., INC. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 253 U. S. App. D. C. 18, 791 F. 2d 189.

No. 86-847. PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 801 F. 2d 1295.

No. 86-848. HAYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 1348.

No. 86-854. MEACHAM ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 799 F. 2d 751.

No. 86-864. AKERS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 799 F. 2d 243.

No. 86-867. SESSION ET UX. *v.* I. T. O. CORPORATION OF AMERIPORT. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1138.

No. 86-873. MAZZA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 792 F. 2d 1210.

No. 86-874. PITTMAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 86-881. CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND ET AL. *v.* KRAFTCO, INC., DBA SEALTEST FOODS DIVISION. C. A. 6th Cir. Certiorari denied. Reported below: 799 F. 2d 1098.

No. 86-883. NESCCO, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 777 F. 2d 1363.

No. 86-886. AUGUSTUS ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 796 F. 2d 205.

No. 86-888. FRANKLIN *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied. Reported below: 516 A. 2d 171.

No. 86-892. SAN MARCOS COUNTY WATER DISTRICT *v.* SAN MARCOS UNIFIED SCHOOL DISTRICT. Sup. Ct. Cal. Certiorari denied. Reported below: 42 Cal. 3d 154, 720 P. 2d 935.

No. 86-896. BENTLEY LABORATORIES, INC. *v.* SHILEY, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 794 F. 2d 1561.

No. 86-899. THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. *v.* JONES; and

No. 86-5924. JONES *v.* THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 1101 and 795 F. 2d 521.

No. 86-902. AMERICAN AIRLINES, INC., ET AL. *v.* DOOLEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 1447.

No. 86-903. ZARTUCHE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 143 Ill. App. 3d 1159, 507 N. E. 2d 555.

No. 86-910. EXPORTADORA COLOMBIANA DE EMERALDAS CO., LTD., ET AL. *v.* $630,000 IN UNITED STATES CURRENCY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1123.

No. 86-912. VAUGHN ET AL. *v.* GENERAL FOODS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 1403.

No. 86-914. MIHALCIK *v.* ILLINOIS EMPLOYERS INSURANCE OF WAUSAU. C. A. 7th Cir. Certiorari denied. Reported below: 801 F. 2d 949.

No. 86-916. CARTER *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 485 So. 2d 260.

No. 86-919. LIMPERT BROTHERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1135.

No. 86-921. BAGLEY *v.* IBP, INC.; and
No. 86-956. IBP, INC. *v.* BAGLEY. C. A. 8th Cir. Certiorari denied. Reported below: 797 F. 2d 632.

No. 86-924. JORDAN *v.* SCHROEDER, PERSONAL REPRESENTATIVE FOR THE ESTATE OF SCHROEDER. Ct. App. Wash. Certiorari denied.

No. 86-929. DELLA-DONNA *v.* GORE NEWSPAPERS CO. ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 489 So. 2d 72.

No. 86-931. MACHLEDER *v.* CBS INC. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 46.

No. 86-945. WKRG-TV, INC. *v.* WILEY. Sup. Ct. Ala. Certiorari denied. Reported below: 495 So. 2d 617.

No. 86-948. CALUMET COUNTY, WISCONSIN *v.* KOSSMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 800 F. 2d 697.

No. 86-949. ARGUS INC. ET AL. *v.* EASTMAN KODAK CO. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 38.

No. 86-959. FALOONA ET AL., BY THEIR NEXT FRIEND, FREDRICKSON *v.* HUSTLER MAGAZINE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 799 F. 2d 1000.

No. 86-961. CAMPBELL SALES CO. *v.* NEW YORK STATE TAX COMMISSION. Ct. App. N. Y. Certiorari denied. Reported below: 68 N. Y. 2d 617, 496 N. E. 2d 213.

No. 86-962. HUTCHINSON ET AL. *v.* MILLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 797 F. 2d 1279.

No. 86-963. BROOKPARK NEWS & BOOKS, INC., ET AL. *v.* CITY OF CLEVELAND ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 86-967. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* BEISSEL. C. A. 3d Cir. Certiorari denied. Reported below: 801 F. 2d 143.

No. 86-968. GENEVA COUNTY BOARD OF EDUCATION *v.* HIDLE. C. A. 11th Cir. Certiorari denied. Reported below: 792 F. 2d 1098.

No. 86-969. KANAREK *v.* WAMBAUGH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 167.

No. 86-970. BINKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 799 F. 2d 695.

No. 86-971. ROBERTSON *v.* ALEXANDER GRANT & CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 798 F. 2d 868.

No. 86-972. HUMMEL *v.* HUMMEL. Sup. Ct. Nev. Certiorari denied. Reported below: 102 Nev. 737.

No. 86-973. SOUTH RANCH OIL CO., INC. *v.* SEISMIC INTERNATIONAL RESEARCH CORP. C. A. 10th Cir. Certiorari denied. Reported below: 793 F. 2d 227.

No. 86-975. WILLIAMS *v.* OVERTON MANOR EAST HOMEOWNERS ASSN., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 723.

No. 86-976. CALIFORNIA *v.* CAREY. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 183 Cal. App. 3d 99, 227 Cal. Rptr. 813.

No. 86-984. BEHAR *v.* SOUTHEAST BANK TRUST CO., N. A., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 801 F. 2d 402.

No. 86-988. JAMESON *v.* BETHLEHEM STEEL CORPORATION PENSION PLAN OF BETHLEHEM STEEL CORPORATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 802 F. 2d 447.

No. 86-992. REARDON *v.* REARDON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1148.

No. 86-993. COX *v.* NORTON, DIRECTOR OF TAX COLLECTION OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT. C. A. 6th Cir. Certiorari denied. Reported below: 797 F. 2d 329.

No. 86-1001. GRAY HILL, INC. *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 145 Ill. App. 3d 371, 495 N. E. 2d 1030.

No. 86-1005. SOMMERS DRUG STORES COMPANY EMPLOYEE PROFIT SHARING TRUST *v.* CORRIGAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 1456.

No. 86–1009. COFFELT ET AL. *v.* ARKANSAS STATE HIGHWAY COMMISSION. Sup. Ct. Ark. Certiorari denied. Reported below: 289 Ark. 348, 712 S. W. 2d 283.

No. 86–1010. HOLYFIELD ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 846.

No. 86–1011. MCGOVREN *v.* SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 86–1017. DEJESUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 806 F. 2d 31.

No. 86–1018. ROSENTHAL *v.* HAFIF ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–1027. SUN-LAND NURSERIES, INC. *v.* SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 793 F. 2d 1110.

No. 86–1028. ROYAL NETHERLANDS STEAMSHIP CO. *v.* QUINTO DE GARCIA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 489 So. 2d 128.

No. 86–1035. MAYES, T/A JACKSON ESTATES *v.* JACKSON TOWNSHIP RENT LEVELING BOARD ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 103 N. J. 362, 511 A. 2d 589.

No. 86–1037. IERVOLINO *v.* DELTA AIR LINES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 796 F. 2d 1408.

No. 86–1041. RIGGIN *v.* RIGGIN. Ct. App. Kan. Certiorari denied. Reported below: 11 Kan. App. 2d xxxiii, 722 P. 2d 591.

No. 86–1047. UNIT RIG & EQUIPMENT CO. *v.* SHELDON. C. A. 10th Cir. Certiorari denied. Reported below: 797 F. 2d 883.

No. 86–1056. CAMOSCIO *v.* HEWETT. App. Ct. Mass. Certiorari denied. Reported below: 22 Mass. App. 1110, 495 N. E. 2d 334.

No. 86–1058. BELL *v.* BELL. C. A. 5th Cir. Certiorari denied. Reported below: 801 F. 2d 396.

No. 86–1066. GIBSON *v.* MOBIL PRODUCING TEXAS & NEW MEXICO, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 797 F. 2d 975.

No. 86–1069. WAGNER ET AL. *v.* BRAZAS ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–1072. NEW YORK *v.* P. J. VIDEO, INC., DBA NETWORK VIDEO, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 68 N. Y. 2d 296, 501 N. E. 2d 556.

No. 86–1073. GREAT COMMONWEALTH LIFE INSURANCE CO. ET AL. *v.* BRANCH BANK & TRUST CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 2d 714.

No. 86–1075. MEEHAN *v.* PPG INDUSTRIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 802 F. 2d 881.

No. 86–1076. PRIETO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1017.

No. 86–1078. GOICHMAN *v.* DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 801 F. 2d 399.

No. 86–1084. BOYLES ET AL. *v.* ALMOND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 792 F. 2d 451.

No. 86–1086. RIVERA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 23 M. J. 89.

No. 86–1087. A & E SUPPLY CO., INC. *v.* NATIONWIDE MUTUAL FIRE INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 798 F. 2d 669.

No. 86–1090. NATION *v.* EL DORADO SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied.

No. 86–1091. LARSON *v.* O'CONNELL ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 143 Ill. App. 3d 1061, 493 N. E. 2d 1175.

No. 86–1093. GUCCIONE *v.* HUSTLER MAGAZINE, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 298.

No. 86–1094. STATON *v.* MAYES ET AL. C. A. 10th Cir. Certiorari denied.

No. 86–1097. APOLLO OF THE OZARKS, INC., ET AL. *v.* GIOTIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 800 F. 2d 660.

No. 86–1100. WILSON *v.* INTERNATIONAL OCEAN TRANSPORT CORP., AKA GRAND BASSA TANKERS, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 86–1103. PAPADAKIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 802 F. 2d 618.

No. 86–1107. HENDERSON *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 8 Conn. App. 342, 512 A. 2d 974.

No. 86–1111. DERBY ASSOCIATES *v.* SEASHORE CLUB CONDOMINIUM ASSN., INC., ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86–1112. TUCKER ET AL. *v.* AMBASSADOR BEACH HOTEL ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 353 Pa. Super. 651, 506 A. 2d 1342.

No. 86–1113. BERGMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied.

No. 86–1117. BARTMAN ET AL. *v.* ALLIS-CHALMERS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 799 F. 2d 311.

No. 86–1120. DIBENEDETTO *v.* MASSACHUSETTS ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 398 Mass. 395, 497 N. E. 2d 266.

No. 86–1124. JACKSON *v.* LOUISIANA DEPARTMENT OF PUBLIC SAFETY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 800 F. 2d 1143.

No. 86–1130. ALLEN *v.* SUPREME COURT OF INDIANA ET AL. Sup. Ct. Ind. Certiorari denied.

No. 86–1132. LOPEZ *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 105 N. M. 538, 734 P. 2d 778.

No. 86–1138. PELHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 801 F. 2d 875.

No. 86–1139. NEVILLE *v.* FINNERTY ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 68 N. Y. 2d 790, 498 N. E. 2d 426.

No. 86–1142. MOODY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 803 F. 2d 123.

No. 86–1182. BODWELL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 798 F. 2d 472.

No. 86–1186. SWIERKOWSKI ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 1145.

No. 86–1189. GEORGIUS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 68 Md. App. 728.

No. 86–1195. JOYCE *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 789.

No. 86–5476. BROWN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 555, 496 N. E. 2d 663.

No. 86–5483. WHEADON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 794 F. 2d 1277.

No. 86–5565. JOVANOVIC *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 933.

No. 86–5581. WALTON *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 793 F. 2d 1294.

No. 86–5657. JEFFERIES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 794 F. 2d 1516.

No. 86–5741. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 799 F. 2d 126.

No. 86–5752. LEWIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 358.

No. 86–5762. WALKER *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 253 U. S. App. D. C. 248, 793 F. 2d 319.

No. 86–5815. MCDERMOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 475.

No. 86–5828. HEINEMANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 86.

No. 86–5855. PAULI *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1035.

No. 86–5857. VAN HORN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 460.

No. 86–5868. FOWLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 1446.

No. 86–5911. WAGUESPACK *v.* PEAVEY CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 795 F. 2d 523.

No. 86–5922. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 802 F. 2d 1108.

No. 86–5928. ELSHENAWY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 801 F. 2d 856.

No. 86–5946. EGGLESTON *v.* COUNTY OF SANTA CLARA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 796 F. 2d 478.

No. 86–5961. GOMEZ *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 789.

No. 86–5976. RODRIQUEZ-MONDRAGON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 86–5982. FALCON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86–5983. BAUER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 800 F. 2d 765.

No. 86–5985. BROWN *v.* RETIREMENT COMMITTEE OF THE BRIGGS & STRATTON RETIREMENT PLAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 521.

No. 86-5988. YANCY *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 86-5989. WILSON *v.* DENTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1037.

No. 86-6006. LYDA ET AL. *v.* JOHN K. ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 86-6010. COX *v.* MUNCY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 806 F. 2d 257.

No. 86-6014. BONDURANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 801 F. 2d 396.

No. 86-6018. CARMONA *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 802 F. 2d 439.

No. 86-6019. COLE *v.* DOUGLAS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 86-6020. BLANDING *v.* MUNCY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 804 F. 2d 677.

No. 86-6022. BARRITT *v.* BORDENKIRCHER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 802 F. 2d 451.

No. 86-6025. STURM *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 797 F. 2d 978.

No. 86-6028. MERCADO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 68 N. Y. 2d 874, 501 N. E. 2d 27.

No. 86-6030. WILKIE *v.* FOLTZ, REGIONAL ADMINISTRATOR, MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 723.

No. 86-6036. WEATHERSPOON *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 716 S. W. 2d 379.

No. 86-6038. TRAYLOR *v.* CITY OF ATLANTA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 805 F. 2d 1420.

No. 86-6039. MYERS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 472.

No. 86-6041. FABIAN *v.* RYAN. Sup. Ct. Fla. Certiorari denied. Reported below: 494 So. 2d 1150.

No. 86-6045. AVEDISIAN *v.* HUBBARD ET UX. C. A. 4th Cir. Certiorari denied. Reported below: 799 F. 2d 751.

No. 86-6046. REESE *v.* FAIRMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 801 F. 2d 275.

No. 86-6047. WARD *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 113 Ill. 2d 516, 499 N. E. 2d 422.

No. 86-6048. BROWN *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 1180.

No. 86-6051. PRITCHETT *v.* GRISSWOLD, ACTING WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 803 F. 2d 1184.

No. 86-6052. PIKOP *v.* BURLINGTON NORTHERN RAILROAD CO., INC. C. A. 8th Cir. Certiorari denied.

No. 86-6053. QUINONEZ-CIENFUEGOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 2d 683.

No. 86-6056. AMOS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 804 F. 2d 679.

No. 86-6058. GRAHAM *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 86-6064. MULAZIM *v.* REDMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 86-6065. WILKINS *v.* WEBB ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 804 F. 2d 678.

No. 86-6068. RUEBKE *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 11 Kan. App. 2d 353, 720 P. 2d 1141.

No. 86-6069. PATTERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 802 F. 2d 452.

No. 86-6070. FITZGIBBONS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 469.

No. 86-6072. DUNLAP *v.* BESHEAR, ATTORNEY GENERAL OF KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1034.

No. 86-6073. ALBERTO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 121 App. Div. 2d 848, 503 N. Y. S. 2d 469.

No. 86-6075. HELLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 86-6077. KUCHER *v.* MADERIOS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 808 F. 2d 1512.

No. 86-6078. LEAL *v.* DAHLBERG, SUPERINTENDENT, OHIO STATE REFORMATORY. C. A. 6th Cir. Certiorari denied.

No. 86-6079. AKBAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 798 F. 2d 473.

No. 86-6080. JAFREE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 801 F. 2d 1344.

No. 86-6081. LITTLE *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86-6083. BUITRAGO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 833 F. 2d 1003.

No. 86-6084. LEWIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 804 F. 2d 143.

No. 86-6086. HARDNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 804 F. 2d 353.

No. 86-6088. WRIGHT *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied.

No. 86-6089. MAHONEY *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 393 N. W. 2d 796.

No. 86-6091. OLIVER *v.* BUNNELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 86-6095. SHEFFY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 351 Pa. Super. 211, 505 A. 2d 604.

No. 86-6096. ISBELL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 179 Ga. App. 363, 346 S. E. 2d 857.

No. 86-6097. JEMISON *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 804 F. 2d 679.

No. 86-6098. GREEN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 86-6099. CHUWANG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 793 F. 2d 1295.

No. 86-6100. LEEHAN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 141 Ill. App. 3d 1176, 503 N. E. 2d 1215.

No. 86-6102. BALL *v.* SECRETARY OF HEALTH AND HUMAN SERVICES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1413.

No. 86-6104. DILLOW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 2d 395.

No. 86-6110. SIANO *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 398 Mass. 1007, 499 N. E. 2d 297.

No. 86-6112. SHAID *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 799 F. 2d 182.

No. 86-6113. VAN GOSSEN *v.* TEXACO INC. C. A. 5th Cir. Certiorari denied. Reported below: 802 F. 2d 453.

No. 86-6115. KING *v.* THOMPSON. Sup. Ct. N. D. Certiorari denied. Reported below: 393 N. W. 2d 733.

No. 86-6116. FREEMAN *v.* KEENEY. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 145.

No. 86-6117. BUCHANAN *v.* REES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 718.

No. 86-6118. HASELHUHN *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 727 P. 2d 280.

No. 86-6119. JONES *v.* HOWARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1034.

No. 86-6122. FERLITO *v.* COMMISSIONER OF CORRECTION OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 833 F. 2d 1002.

No. 86-6126. MYERS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 795 F. 2d 1016.

No. 86-6127. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 805 F. 2d 1031.

No. 86-6128. JACKSON *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 86-6131. ARMSTRONG *v.* CHRANS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 86-6132. ALONZO *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86-6135. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 805 F. 2d 1042.

No. 86-6136. MARTIN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 86-6137. SAFIR *v.* UNITED STATES LINES INC. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 19.

No. 86-6138. POWELL *v.* FIORI ET AL. C. A. 10th Cir. Certiorari denied.

No. 86-6140. WALLACE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 86-6141. BARTRUG ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 86-6142. JOHNSON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 86-6144. CONGER *v.* LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied.

No. 86-6146. TYSKO *v.* HAIGH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 802 F. 2d 449.

No. 86-6147. RUSSELL *v.* GARRAGHTY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 799 F. 2d 751.

No. 86-6149. RULE *v.* O'LEARY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 86-6151. WARD *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1037.

No. 86-6152. ROJAS-GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 805 F. 2d 1041.

No. 86-6153. GRIFFITH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 796 F. 2d 1477.

No. 86-6155. MCBRIDE ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 801 F. 2d 1045.

No. 86-6157. MILLER, ADMINISTRATRIX OF THE ESTATE OF MILLER *v.* MECKLENBURG COUNTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 402.

No. 86-6158. VENEGAS *v.* UNITED STATES; and
No. 86-6198. VINDIOLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 868.

No. 86-6162. CLARK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 255.

No. 86-6165. BOTTIGLIERIE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 802 F. 2d 449.

No. 86-6172. SPERLING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 2d 391.

No. 86-6174. NICHOLAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 263.

No. 86-6178. MONTOYA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 804 F. 2d 1249.

No. 86-6181. HENKEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 799 F. 2d 369.

No. 86-6186. FERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 794 F. 2d 1533.

No. 86-6189. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 1253.

No. 86-6211. PARKER *v.* ILLINOIS. App. Ct Ill., 1st Dist. Certiorari denied. Reported below: 142 Ill. App. 3d 630, 491 N. E. 2d 1285.

No. 85-6783. WRIGHT *v.* ILLINOIS. Sup. Ct. Ill.;
No. 85-7008. LESKO *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 85-7016. FLOYD *v.* ALABAMA. Sup. Ct. Ala.;
No. 85-7232. CARGILL *v.* GEORGIA. Sup. Ct. Ga.;
No. 86-5207. MORGAN *v.* ILLINOIS. Sup. Ct. Ill.;
No. 86-5434. OLINGER *v.* ILLINOIS. Sup. Ct. Ill.;
No. 86-5599. MONTGOMERY *v.* ILLINOIS. Sup. Ct. Ill.;
No. 86-5801. HILL *v.* NEVADA. Sup. Ct. Nev.;
No. 86-5906. SZABO *v.* ILLINOIS. Sup. Ct. Ill.;
No. 86-5958. COOPER *v.* FLORIDA. Sup. Ct. Fla.;
No. 86-5994. BROOKS *v.* OHIO. Sup. Ct. Ohio;
No. 86-5997. JUSTUS *v.* BASS, SUPERINTENDENT, MECKLENBURG CORRECTIONAL CENTER. Sup. Ct. Va.;
No. 86-6017. HILL *v.* ARKANSAS. Sup. Ct. Ark.;
No. 86-6026. WRIGHT *v.* ALABAMA. Sup. Ct. Ala.;
No. 86-6033. COOPER *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 86-6092. MUHAMMAD *v.* FLORIDA. Sup. Ct. Fla.; and
No. 86-6194. DUFOUR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 85-6783, 111 Ill. 2d 128, 490 N. E. 2d 640; No. 85-7008, 509 Pa. 67, 501 A. 2d 200; No. 85-7016, 486 So. 2d 1321; No. 85-7232, 255 Ga. 616, 340 S. E. 2d 891; No. 86-5207, 112 Ill. 2d 111, 492 N. E. 2d 1303; No. 86-5434, 112 Ill. 2d 324, 493 N. E. 2d 579; No. 86-5599, 112 Ill. 2d 517, 494 N. E. 2d 475; No. 86-5801, 102 Nev. 377, 724 P. 2d 734; No. 86-5906, 113 Ill. 2d 83, 497 N. E. 2d 995; No. 86-5958, 492 So. 2d 1059; No. 86-5994, 25 Ohio St. 3d 144, 495 N. E. 2d 407; No. 86-6017, 289 Ark. 387, 713 S. W. 2d 233; No. 86-6026, 494 So. 2d 745; No. 86-6033, 718 S. W. 2d 256; No. 86-6092, 494 So. 2d 969; No. 86-6194, 495 So. 2d 154.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 86-589. KRUPPS ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 712 S. W. 2d 144.

No. 86-830. CELCOM COMMUNICATIONS CORPORATION OF PENNSYLVANIA *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 253 U. S. App. D. C. 171, 792 F. 2d 239.

No. 86-882. HODGSON ET AL. *v.* MINNESOTA ET AL.; and
No. 86-1114. MINNESOTA *v.* HODGSON ET AL. C. A. 8th Cir. Certiorari before judgment denied.

No. 86-885. BOSTON & MAINE CORP. *v.* LENFEST ET AL. C. A. 1st Cir. Motion of National Railway Labor Conference for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 799 F. 2d 795.

No. 86-893. JACKSON WATER WORKS, INC., ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL would grant certiorari. Reported below: 793 F. 2d 1090.

No. 86-938. TENNESSEE *v.* FLETCHER. Ct. Crim. App. Tenn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 86-965. MILLER ET AL. *v.* SULLIVAN ET AL. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 150 Ariz. 573, 724 P. 2d 1242.

No. 86-981. MAJOR MEDIA OF THE SOUTHEAST, INC., DBA NAEGELE OUTDOOR ADVERTISING COMPANY OF RALEIGH-DURHAM *v.* CITY OF RALEIGH. C. A. 4th Cir. Motions of North Carolina Restaurant Association, Outdoor Advertising Association of America,

Inc., and Advertising Council Inc. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 792 F. 2d 1269.

No. 86-982. HANTON *v.* KENNEDY ET AL. C. A. 6th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 797 F. 2d 297.

No. 86-1003. SALINAS ET AL. *v.* ROADWAY EXPRESS, INC., ET AL. C. A. 5th Cir. Motion of respondent Roadway Express, Inc., for damages denied. Certiorari denied. Reported below: 802 F. 2d 787.

No. 86-1036. DOUBLE RAINBOW GOURMET ICE CREAMS *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (PILLSBURY CO. ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 86-5996. BARKSDALE ET AL. *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 86-6074. GORMONG *v.* CLEVELAND ELECTRIC COMPANY OF GEORGIA, INC. Ct. App. Ga. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 180 Ga. App. 481, 349 S. E. 2d 500.

No. 86-1039. TOWNSHIP OF PISCATAWAY ET AL. *v.* NEW JERSEY CITIZEN ACTION ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 797 F. 2d 1250.

No. 86-1109. CELAURO, COMMISSIONER OF REVENUE OF TENNESSEE *v.* MIDLAND BANK & TRUST CO. ET AL. Sup. Ct. Tenn. Motion of Multistate Tax Commission for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 717 S. W. 2d 580.

No. 86-1123. RELIGIOUS TECHNOLOGY CENTER ET AL. *v.* WOLLERSHEIM ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 796 F. 2d 1076.

No. 86–1196 (A–532). BENNETT *v.* TEXAS. Ct. Crim. App. Tex. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied. Certiorari denied.

No. 86–5846. HOVEY *v.* MCCARTHY, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Cal. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 86–5902. GWALTNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 790 F. 2d 1378.

Rehearing Denied

No. 86–615. BROWN *v.* BROWN, *ante*, p. 1008;

No. 86–619. ALLEN *v.* CHILTON CO., DIVISION OF A. B. C., INC., *ante*, p. 1008;

No. 86–667. POLYAK *v.* BUFORD EVANS & SONS, *ante*, p. 1018;

No. 86–5761. BRATTON-BEY *v.* COMPTROLLER OF THE TREASURY, *ante*, p. 994;

No. 86–5863. DUBOSE *v.* UNITED STATES, *ante*, p. 1042;

No. 86–5886. TELEPO *v.* EDWARDS ET AL., *ante*, p. 1042; and

No. 86–5942. TAFT-TSARELKA *v.* MASSACHUSETTS ET AL., *ante*, p. 1043. Petitions for rehearing denied.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1104 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

CURRY ET AL. *v.* BAKER, CHAIRMAN OF ALABAMA STATE DEMOCRATIC EXECUTIVE COMMITTEE, ET AL.

ON APPLICATION FOR STAY

No. A–262. Decided October 7, 1986

The applicants seek a stay of the mandate of the Court of Appeals. The Court of Appeals found, with respect to the applicants' 42 U. S. C. § 1983 action, no violation of federal law by the Alabama Democratic Executive Committee in certifying the opponent of one of the applicants, after a runoff election, as the Democratic gubernatorial nominee. Consequently, the Court of Appeals reversed the District Court's order of another runoff election. The application is denied because a stay is not warranted by the fact, alone, that the applicant-candidate will suffer irreparable injury in the absence of another runoff election.

JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the mandate of the Court of Appeals for the Eleventh Circuit pending the filing and disposition of a petition for certiorari. The case involves the legal contest between two candidates for the Democratic gubernatorial nomination in Alabama.* One of the applicants received a majority of the votes cast in a runoff election held on June 24, 1986. A three-judge court found that the applicant had encouraged widespread violations of a state party rule against crossover voting in the runoff, a rule that apparently has the force of state law. *Henderson* v. *Graddick*, 641 F. Supp. 1192 (MD Ala. 1986). The State Democratic Executive Committee conducted an investiga-

*The applicants are one of the candidates and two persons who voted for him in the runoff.

tion, concluded that the applicant's opponent received a majority of the votes legally cast, and certified the applicant's opponent as the Democratic nominee. The issue, generally stated, is whether the actions of the State Democratic Executive Committee exceeded the bounds of due process. Following state-court litigation, the applicants filed this 42 U. S. C. § 1983 action in the District Court for the Northern District of Alabama. The District Court found a constitutional violation and ordered a new election. On appeal, the Court of Appeals for the Eleventh Circuit reversed. 802 F. 2d 1302 (1986). The court found no violation of federal law.

This Court rarely grants a stay of mandate pending disposition of the petition for certiorari unless three conditions are met. First, there must be a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari. Second, there must be a significant possibility that a majority of the Court will conclude that the decision below was erroneous. Finally, there must be a likelihood that irreparable harm will result if the decision below is not stayed. *White* v. *Florida*, 458 U. S. 1301, 1302 (1982) (POWELL, J., in chambers). This case presents unique facts closely tied to Alabama election law and rules. The applicants concede that this case is unlikely to recur. There is no conflict among the Circuits. It is no doubt true that, absent the runoff election ordered by the District Court, the applicant here will suffer irreparable injury. This fact alone is not sufficient to justify a stay in the unique circumstances of this case. Accordingly, the application is denied.

KENTUCKY *v.* STINCER

ON APPLICATION FOR STAY

No. A–274 (86–572). Decided October 15, 1986

An application by the Commonwealth of Kentucky to stay the Kentucky Supreme Court's judgment—holding that the Confrontation Clause of the Sixth Amendment gives an accused child molester the right to be present at the hearing inquiring into the victim's competency to testify—is denied. After this case was decided, the Kentucky Legislature enacted a statute providing procedures for securing the testimony of young victims of sexual abuse, and the Kentucky Supreme Court has upheld the validity of the statute, even though it does not require the accused's presence at the competency hearing. Under the circumstances, there is no reasonable probability that four Justices will vote to grant certiorari.

JUSTICE SCALIA, Circuit Justice.

I doubt the conclusion of the Kentucky Supreme Court that the Confrontation Clause of the Sixth Amendment gives an accused child molester the right to be present at the hearing inquiring into the competency of his child victim to testify. I see, moreover, at least a "fair prospect" that a majority of this Court would find that conclusion erroneous. See *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers). However, approximately one month after this case was decided the Kentucky Legislature enacted a statute providing specific procedures for securing the testimony of young victims of sexual abuse. See Ky. Rev. Stat. § 421.350 (Supp. 1986). The Supreme Court of Kentucky has upheld the validity of that statute, even though it does not require presence of the accused at the competency hearing. See *Commonwealth* v. *Willis*, 716 S. W. 2d 224 (1986). Since, therefore, it is unlikely that the issue presented by this case will arise again in Kentucky, and since I am unaware of any other State which has resolved the issue as did the Kentucky Supreme Court, see, *e. g.*, *State* v. *Taylor*, 103 N. M. 189, 195, 704 P. 2d 443, 449 (App. 1985); *Moll* v. *State*, 351 N. W. 2d 639, 644 (Minn. App. 1984); *People* v.

Breitweiser, 38 Ill. App. 3d 1066, 1067–1068, 349 N. E. 2d 454, 455–456 (1976); *State* v. *Ritchey*, 107 Ariz. 552, 555, 490 P. 2d 558, 561 (1971), I cannot discern "a 'reasonable probability' that four Justices will . . . [vote] to grant certiorari . . . ." *Rostker* v. *Goldberg*, *supra*, at 1308 (citations omitted). The application for stay of the Commonwealth of Kentucky is accordingly

Denied.

HICKS, DISTRICT ATTORNEY FOR COUNTY OF ORANGE, CALIFORNIA, ACTING ON BEHALF OF FEIOCK *v.* FEIOCK

ON APPLICATION FOR STAY

No. A–288. Decided October 23, 1986

An application to stay enforcement of the California Court of Appeal's judgment is granted pending the timely filing and subsequent disposition of a petition for certiorari. A state trial court, holding respondent in civil contempt for failure to make previously ordered child support payments, had applied a state statute providing that proof of service on a parent of a valid child support order, together with proof of noncompliance, constitutes prima facie evidence of contempt of court. Granting habeas corpus relief, the Court of Appeal held that the statute violated the Fourteenth Amendment's Due Process Clause because it created a mandatory presumption impermissibly shifting to the nonpaying parent the burden of proving inability to comply with the child support order. It is likely that at least four Justices will vote to grant certiorari, and that the applicant will prevail on the merits. Moreover, the balance of equities clearly weighs in favor of a stay.

JUSTICE O'CONNOR, Circuit Justice.

Applicant requests that I issue a stay pending the filing and disposition of a petition for certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, Division Three. The California Court of Appeal judgment granted Phillip William Feiock's petition for habeas corpus, holding that the United States Constitution requires that the government prove beyond a reasonable doubt in a civil contempt proceeding that Mr. Feiock was able to comply with a previous court order. The Orange County Superior Court had ordered Mr. Feiock to make child support payments, and after Mr. Feiock failed to comply with this court order, he was held in civil contempt. He was sentenced to a 25-day suspended sentence, placed on probation, and ordered to begin making his child support payments or prepare himself for incarceration. At the civil contempt hearing, the

trial court applied Cal. Civ. Proc. Code Ann. § 1209.5 (West 1982), which provides that proof that a court of competent jurisdiction had issued a child support order which was filed and served on a parent, together with proof of noncompliance, constitutes prima facie evidence of a contempt of court.

On petition of Mr. Feiock, the California Court of Appeal granted a writ of habeas corpus and annulled the judgment of contempt. *In re Feiock*, 180 Cal. App. 3d 649, 225 Cal. Rptr. 748 (1986). The court held that § 1209.5 was unconstitutional under the Due Process Clause of the Fourteenth Amendment because it created a mandatory presumption that shifted the burden of proof to the defendant, requiring him to prove that he was unable to comply with the child support order. The court relied on this Court's decisions involving the use of mandatory presumptions in criminal prosecutions. See *Sandstrom* v. *Montana*, 442 U. S. 510 (1979); *Ulster County Court* v. *Allen*, 442 U. S. 140 (1979). The Supreme Court of California denied the State's petition for review.

My obligation as a Circuit Justice in considering a stay application under 28 U. S. C. § 2101(f) and Rule 44 of this Court is "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Independent School District* v. *United States*, 448 U. S. 1342 (1980) (REHNQUIST, J., in chambers). These factors lead me to conclude that the request for a stay should be granted.

I have serious doubts about the validity of the California Court of Appeal's conclusion in light of this Court's nearly unanimous decision in *United States* v. *Rylander*, 460 U. S. 752 (1983). In *Rylander*, this Court held that an alleged contemner has the burden of showing a current inability to comply with a court order, and that a contemner must overcome a presumption of ability to comply with a court order. Moreover, the decision of the California Court of Appeal that the

State must prove a parent's ability to comply with a child support order has far-reaching implications for the enforcement of child support obligations. I think it fair to say, therefore, that at least four Justices would vote to grant certiorari. Furthermore, given this Court's holding in *Rylander*, I conclude that applicant is likely to prevail on the merits.

Finally, the balance of equities clearly weighs in favor of a stay. The father is required merely to comply with an admittedly valid child support obligation. The decision of the California Court of Appeal, however, will make it far more difficult for the State of California to enforce child support payments. As even the Court of Appeal observes, its judgment permits recalcitrant parents to "literally 'sit on [their] hands,' and defend any contempt allegation by relying on the prosecution's burden of proof." 180 Cal. App. 3d, at 654, 225 Cal. Rptr., at 750. The burden placed on the State, custodial parents, and children is unquestionably sufficient to support a stay. Finally, because the Orange County Superior Court has not yet dismissed the judgment of contempt it appears that this case is not moot. Cf. *California* v. *Brown* 475 U. S. 1301 (1986) (REHNQUIST, J., in chambers).

I therefore grant the requested stay of the enforcement of the judgment of the California Court of Appeal pending the timely filing and subsequent disposition of a writ of certiorari in this case.

It is so ordered.

KLEEM, ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE

ON APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

No. A–416. Decided December 4, 1986

An application, authorized by 28 U. S. C. § 2101(c), for a 60-day extension of time in which to file a petition for a writ of certiorari to the Court of Appeals is denied. Applicants' counsel has not met § 2101(c)'s standard of "good cause shown" by simply asserting his desire for additional time to research constitutional issues.

JUSTICE SCALIA, Circuit Justice.

Counsel for applicants has asked for a 60-day extension of time in which to file a petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit. The stated reason for the request is that the case presents "important questions under the Constitution of the United States which were determined adversely to the petitioner by the court below," and counsel desires "additional time to research and prepare the Writ of Certiorari."

Writs of certiorari in civil cases "shall be . . . applied for within ninety days" after entry of the subject judgment, 28 U. S. C. § 2101(c), which period may be extended by a Justice of this Court (up to an additional 60 days) "for good cause shown," *ibid.* Under this Court's Rule 20.6, requests for extensions of time "are not favored." In this case, counsel has given no reason for his request other than his desire for additional time to research constitutional issues. The same reason could be adduced in virtually all cases. It does not meet the standard of "good cause shown" for the granting of a disfavored extension. Pursuant to the Rules of this Court, the application for extension is

Denied.

LEDBETTER, COMMISSIONER, GEORGIA DEPT. OF HUMAN RESOURCES *v.* BALDWIN ET AL.

ON APPLICATION FOR STAY

No. A–448. Decided December 18, 1986

An application to stay the Federal District Court's order, pending appeal, is granted. In respondents' suit challenging the constitutionality of applicant's regulations that implemented the federal-law requirement that child support payments made to certain children living with the family be considered in determining the family's need for payments under the Aid to Families with Dependent Children Program, the District Court held that the regulations were unconstitutional. Respondents concede that the case raises an issue sufficiently meritorious for this Court to note probable jurisdiction, and there is a significant possibility that the Court will reverse the lower court's judgment. Moreover, the balance of irreparable injuries supports a stay.

JUSTICE POWELL, Circuit Justice.

Applicant in this case is the Commissioner of the Georgia Department of Human Resources. He promulgated regulations implementing 42 U. S. C. § 602(a)(38) (1982 ed., Supp. III). That section alters the requirements for state plans distributing grants under the Aid to Families with Dependent Children (AFDC) program. Generally, § 602(a)(38) requires the States, in determining a family's need for AFDC payments, to consider child support payments made to certain children living with the family. Respondents filed suit in the United States District Court for the Northern District of Georgia, contending that applicant's regulations violated the Federal Constitution in two respects: the regulations took property from the children without just compensation and violated substantive due process. The District Court held in favor of respondents and declared the regulations unconstitutional. Applicant sought a stay pending appeal from the District Court. Before the District Court ruled on that motion, applicant filed a notice of appeal in this Court pur-

suant to 28 U. S. C. §§ 1252 and 2101. Subsequently, the District Court denied applicant's request for a stay.

Three considerations govern a Justice's decision whether to grant an application for a stay pending appeal. First, there must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious to justify notation of probable jurisdiction. Second, there must be a significant possibility of reversal of the lower court's decision. Finally, there must be a likelihood that irreparable harm will result if the lower court's decision is not stayed. See *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers); *Graves* v. *Barnes*, 405 U. S. 1201, 1203–1204 (1972) (POWELL, J., in chambers).

Respondents concede that the case raises an issue sufficiently meritorious for the Court to note probable jurisdiction. On December 8, the Court noted probable jurisdiction in the similar cases of *Kirk* v. *Gilliard*, No. 86–564, and *Bowen* v. *Gilliard*, No. 86–509 (both on appeal from *Gilliard* v. *Kirk*, 633 F. Supp. 1529 (WDNC 1986)). My review of the papers filed with this application and in Nos. 86–564 and 86–509 convinces me that there is a significant possibility that the Court will reverse the lower court's decision in this case. Finally, the State will suffer irreparable harm if the decision is not stayed. The State will bear the administrative costs of changing its system to comply with the District Court's order. Even if this Court reverses the judgment of the District Court, it is unlikely that the State would be able to recover these costs. Similarly, it is unlikely that disputed payments made pursuant to the District Court's judgment could be recovered. On the other hand, respondents argue that they will suffer irreparable injury if a stay is issued. If the Court affirms the judgment of the District Court, a stay will have deprived them of the disputed payments during the period of the Court's consideration. If the State then pays the disputed amount with interest, as presumably it would,

this may not fully compensate respondents for the difficulties caused by interruption of their income. Although respondents' argument has some force, I conclude that the balance of irreparable injuries, coupled with the likelihood of reversal on the merits, supports a stay.

The application is granted.

OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. *v.* NUCLEAR REGULATORY COMMISSION ET AL.

ON APPLICATION FOR STAY

No. A–480. Decided December 31, 1986

An application to stay the Court of Appeals' "mandate" is denied. The application seeks an order under 28 U. S. C. § 2101(f) staying the full-power operation of a nuclear powerplant until the Court of Appeals issues its final decision in applicant's pending suit against the Nuclear Regulatory Commission, and, should applicant be unsuccessful in that suit, until disposition of a petition for writ of certiorari in this Court. It is only the execution or enforcement of *final* orders that is stayable under § 2101(f), and the only extant order which, if stayed, could affect the powerplant's full-power operation is the Court of Appeals' order lifting its previously granted stay of full-power operation. That order—like the stay itself—is interlocutory. What applicant would require to achieve the substantive relief it seeks is an original writ of injunction from the Circuit Justice, pursuant to the All Writs Act and this Court's Rule 44.1, against the powerplant's full-power operation. However, counsel will not be considered to have asked for such extraordinary relief where, as here, he has neither specifically requested it nor addressed the peculiar requirements for its issuance.

JUSTICE SCALIA, Circuit Justice.

Ohio Citizens for Responsible Energy, Inc., has filed with me as Circuit Justice for the Sixth Circuit an "Application to Stay Mandate of United States Court of Appeals for the Sixth Circuit Pending Certiorari," seeking an order under 28 U. S. C. § 2101(f) staying the full-power operation of the Perry Nuclear Power Plant located near Cleveland, Ohio. The order sought would remain in effect until the Court of Appeals for the Sixth Circuit issues its final decision in the pending suit filed by the applicant against the Nuclear Regulatory Commission, and, should the applicant be unsuccessful in that suit, until disposition of a petition for writ of certiorari in this Court.

The application must be denied. Section 2101(f) provides: "In any case in which the *final* judgment or decree of any

court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of *such* judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." (Emphasis added.) It is clear from this language that, even though certiorari review of interlocutory orders of federal courts is available, see 28 U. S. C. §§ 1254(1) and 1292, it is only the execution or enforcement of *final* orders that is stayable under § 2101(f). See *Twentieth Century Airlines, Inc.* v. *Ryan*, 74 S. Ct. 8, 10, 98 L. Ed. 1143, 1145 (1953) (Reed, J., in chambers). In this case, the only extant order which, if stayed, could conceivably affect the full-power operation of the Perry plant, is the Sixth Circuit's order of December 23, 1986, lifting the stay of full-power operation that it imposed on November 13, 1986. That order, however—like the stay itself—is interlocutory.

What the applicant would require in order to achieve the substantive relief that it seeks is an original writ of injunction, pursuant to the All Writs Act, 28 U. S. C. § 1651(a), and this Court's Rule 44.1, against full-power operation of the powerplant. A Circuit Justice's issuance of such a writ—which, unlike a § 2101(f) stay, does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts—demands a significantly higher justification than that described in the § 2101(f) stay cases cited by the applicant, *e. g.*, *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers). The Circuit Justice's injunctive power is to be used "'sparingly and only in the most critical and exigent circumstances,'" *Fishman* v. *Schaffer*, 429 U. S. 1325, 1326 (1976) (MARSHALL, J., in chambers) (quoting *Williams* v. *Rhodes*, 89 S. Ct. 1, 2, 21 L. Ed. 2d 69, 70 (1968) (Stewart, J., in chambers)), and only where the legal rights at issue are "indisputably clear," *Communist Party of Indiana* v. *Whitcomb*, 409 U. S. 1235 (1972) (REHNQUIST, J., in chambers). Moreover, the applicant must demonstrate that the injunc-

tive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." 28 U. S. C. § 1651(a). I will not consider counsel to have asked for such extraordinary relief where, as here, he has neither specifically requested it nor addressed the peculiar requirements for its issuance.

The application for stay is denied.

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SEARCHES AND SEIZURES. See **Constitutional Law, VII.**

SELECTION OF JURORS. See **Criminal Law.**

SELF-INCRIMINATION. See **Constitutional Law, V.**

SEVENTEENTH AMENDMENT. See **Constitutional Law, III, 2.**

SEX DISCRIMINATION. See **Civil Rights Act of 1964, 2; Unemployment Compensation.**

SHERMAN ACT. See **Antitrust Acts, 1.**

SIXTH AMENDMENT. See **Constitutional Law, VI; Stays, 3.**

SOCIAL SECURITY ACT. See **Stays, 1.**

SOCIAL SECURITY TAXES. See **Internal Revenue Code.**

SOVEREIGN IMMUNITY. See **Disaster Relief Act of 1970.**

STAGGERS RAIL ACT OF 1980.

Combined railroad-truck transportation—Regulation.—Interstate Commerce Commission's authority under Act to exempt from state regulation railroad services involving door-to-door movement of goods by use of truck trailers or cargo containers that are transported both by railroad flatcars and trucks on highways encompasses motor freight portion of a shipment entirely within a State on equipment owned and operated by rail carrier. ICC v. Texas, p. 450.

STANDING TO SUE. See **National Bank Act.**

STATE-ACTION EXEMPTION FROM ANTITRUST LAWS. See **Antitrust Acts, 1.**

STATE PERSONAL PROPERTY TAXES.

Tax on imports—Tobacco stored in customs warehouses—Validity of state law.—Consistent with Supremacy Clause, a State may impose a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse and destined for domestic manufacture and

STATE PERSONAL PROPERTY TAXES—Continued.

sale; application of North Carolina's tobacco tax to appellant's imported tobacco, stored for aging in customs-bonded warehouses in State prior to blending with domestic tobacco for ultimate consumption in United States, did not violate either Import-Export Clause or Due Process Clause, and this Court had jurisdiction to review North Carolina Supreme Court's judgment granting appellees' motion to dismiss appellant's appeal from State Court of Appeals' judgment upholding tax statutes. R. J. Reynolds Tobacco Co. v. Durham County, p. 130.

STATES' IMMUNITY FROM LIABILITY FOR PREJUDGMENT INTEREST. See **Disaster Relief Act of 1970.**

STAYS.

1. *Aid to Families with Dependent Children Program.*—Application to stay District Court's order—holding unconstitutional state regulations that implemented federal-law requirement that child support payments made to certain children living with family be considered in determining family's need for payments under Aid to Families with Dependent Children Program—is granted. Ledbetter v. Baldwin (POWELL, J., in chambers), p. 1309.

2. *Child support.*—Application to stay California Court of Appeal's judgment—holding that Due Process Clause was violated by a state statute which provided that proof of service on a parent of a valid child support order, together with proof of noncompliance, constituted prima facie evidence of contempt of court—is granted. Hicks v. Feiock (O'CONNOR, J., in chambers), p. 1305.

3. *Confrontation Clause.*—Application to stay Kentucky Supreme Court's judgment—holding that Confrontation Clause gives an accused child molester the right to be present at hearing inquiring into victim's competency to testify—is denied. Kentucky v. Stincer (SCALIA, J., in chambers), p. 1303.

4. *Nuclear power plant.*—Application to stay full-power operation of a nuclear power plant, pending Court of Appeals' final decision in applicant's suit against respondent, is denied. Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n (SCALIA, J., in chambers), p. 1312.

5. *Runoff election.*—Application to stay Court of Appeals' mandate reversing District Court's judgment that ordered a second runoff election for a political party's gubernatorial candidate is denied. Curry v. Baker (POWELL, J., in chambers), p. 1301.

SUPREMACY CLAUSE. See **Public Safety Officers' Death Benefits Act; State Personal Property Taxes.**

SUPREME COURT. See also **State Personal Property Taxes.**

1. Proceedings in memory of Justice Stewart, p. VII.
2. Retirement of Henry C. Lind as Reporter of Decisions, p. XXI.
3. Appointment of Frank D. Wagner as Reporter of Decisions, p. 1023.

SUSPENSION OF DEPORTATION. See **Immigration and Nationality Act.**

TAXES. See **Federal Income Taxes; Internal Revenue Code; State Personal Property Taxes; Unemployment Compensation.**

TENANTS' CAUSE OF ACTION FOR RENT-CEILING VIOLATIONS. See **Civil Rights Act of 1871.**

TIME EXTENSION FOR FILING FOR CERTIORARI. See **Certiorari.**

TOBACCO. See **State Personal Property Taxes.**

TRUCKS. See **Staggers Rail Act of 1980.**

TWENTY-FIRST AMENDMENT. See **Antitrust Acts, 1; Constitutional Law, VIII.**

UNEMPLOYMENT COMPENSATION.

Federal Unemployment Tax Act—Pregnancy—Validity of state law.—A Missouri statute—which disqualifies an unemployment benefits claimant who has left his work voluntarily without good cause attributable to his work or to his employer—is consistent with Federal Unemployment Tax Act's provision stating that no State participating in federal-state unemployment compensation program shall deny any compensation solely on basis of pregnancy or termination of pregnancy; respondent thus could apply Missouri statute in rejecting claim for benefits by petitioner who left her employment because of pregnancy and, pursuant to employer's policy, was not later rehired because no positions were open. Wimberly v. Labor and Industrial Relations Comm'n of Mo., p. 511.

VEHICLE SEARCHES. See **Constitutional Law, VII.**

VOLUNTARINESS OF CONFESSIONS. See **Constitutional Law, II, V, VI.**

VOTING RIGHTS ACT OF 1965.

City's annexation of land—Federal preclearance.—A covered city's annexation of inhabited land constitutes a change in voting practice or procedure subject to federal preclearance under § 5 of Act, and even annexation of vacant land on which residential development is anticipated must be precleared before those moving into area may vote in annexing jurisdiction; District Court did not err in concluding that appellant city had not carried its burden of showing that annexations in this case were untainted

VOTING RIGHTS ACT OF 1965—Continued.
by a racially discriminatory purpose. Pleasant Grove v. United States, p. 462.

WASHINGTON STATE. See **Constitutional Law**, III, 1.

WATER POLLUTION. See **Clean Water Act.**

WELFARE BENEFITS. See **Stays**, 1; **Unemployment Compensation.**

WITHHOLDING TAXES. See **Internal Revenue Code.**

WITNESSES. See **Stays**, 3.

WORDS AND PHRASES.

"Child." § 244(a)(1), Immigration and Nationality Act, 8 U. S. C. § 1254(a)(1). INS v. Hector, p. 85.

WORKERS' COMPENSATION. See **Public Safety Officers' Death Benefits Act.**